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**WIDOWHOOD AND PROPERTY AMONG THE BAGANDA
OF UGANDA : UNCOVERING THE PASSIVE VICTIM.**

Beatrice Odonga Mwaka

A thesis submitted in fulfillment of the requirement of the degree of Doctor of
Philosophy in Law (Ph.D).
University of Warwick
November 1998

DEDICATION

To Julie Akidi Mwaka, my beloved daughter, who prayed faithfully to God to “to help Mummy finish her work so that we can have more time together,” and for telling me every day during this long long stretch and without fail ‘Mummy I love you, a zillion times!’ Sorry I took so long. You are precious. You are a friend. May you stay so. I love you.

To my parents, Professor A .M. Odonga (Babba) (who wrote the equivalent of two of my thesis in the time it took me to write one !) and Mrs J. M Odonga (Mama), his occasional adviser. There is much wisdom in old age! Always faithful in prayer, always caring and concerned for your children and grandchildren. Thank you. With my love.

Declaration

The materials used in this study are the sole work of the author and where materials from other sources are used they are acknowledged. This work has not previously been submitted for a degree at this or any other University or Institution.

SYNOPSIS

This is a socio-legal study of widowhood among the Baganda of Uganda. The thesis explores widowhood as it affects women within their local cultural context to determine *the extent to which they pursue their rights in property and other family relationships*. The thesis takes the position that to see them as 'passive victims' is to deny them a 'voice.' It homogenises them denying them their individuality. To this end the thesis explores the *activities individual women* undertake to pursue their interests. The study examines their perceptions of their situations as narrated through their own voices and what they have done or are doing about the situation. Widowhood flows from death in a marriage relationship. Consequently, the thesis begins with a woman entering into marriage, exploring how she is conceptualised through the giving of marriage gifts/bridewealth and the consequences that flow from that in a marriage relationship and its implications for widowhood.

The study argues that there is need to understand the *local cultural context* in which women live and that within this context there are *several regulatory regimes/semi autonomous social fields* that regulate the society. This includes customs and cultural practices, the imported western law and in recent years the Resistance Councils which were created by the State to encourage democratic participation and popular justice beginning at grassroots. None of these regimes are autonomous from the other although each seeks to exert its own power. This has far reaching consequences for the extent to which a woman can assert herself. Within this the 'family council' or clan to which every person in that society belongs emerges as the strongest regulatory regime. The study reveals that the choice of regimes allows a woman to pick and choose where to assert her rights depending on her interests, location and resource position. Within these set of circumstances *her self perception as an individual with rights is the strongest tool in driving her to pursue her interests*.

The study also reveals that in some cases the written imported law supports cultural practices but because it is perceived as foreign, there has not been openness nor understanding of the substance of the law thus resulting in conflicts with customary practices. This is most evident in rural societies where cultural practices find their strongest means of expression. However there is room for harmony where the law does not seek to impose itself on other regulatory regimes but recognizes the need for sharing of powers and working in cooperation with these other regimes. In this respect the creation of the RC system which encourages local informal dispute resolution and which has the capacity to respond to social factors and changing attitudes within the community and the wider legal system can be an effective tool for legal innovation and draw the women as a whole into decision making.

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Acknowledgements

To God, for all that I am and for helping me these long long difficult years. I began as one person and now am a different person. Because of you, I reached this goal. I offer you my future.

Academic

To **Ann Stewart**, my supervisor, thank you for your constructive criticism and for being so understanding of my difficult circumstances.

Chris Whelan for research methodology and the famous "and so what" question.

Margaret Wright, (Secretary) always cheerful. Thanks for helping me keep my sanity by being so well organized with Academic necessities.

Weibina Heesterman for helping me understand modern technology.

The School of law and Graduate School, University of Warwick, for giving me the time I needed. I'm truly grateful.

Makerere University Kampala, Uganda and the Faculty of Law for giving me study leave to help me develop my academic skills.

Friends in Coventry

Dr Jean Hartley, Prof. John Bennington and Kris Bennington. We met as *strangers* but *you have become family*. Thanks especially for loving and caring for Julie. Chris, thanks for being a responsible 'brother' to Julie. I'm indebted to all of you.

Dr Wilfrid and Catherine Kendall and children, Edward, Rosalind, James and Olivia. God bless you for your open hearts and open home- Julie's weekly stop over after school.

Sanyu Semafulu and Dr. Tony Richards and your delightful children, Rosie and Benjamin. Only God knows what a difference you made at the 11th hour when shelter had become a crisis and the last academic hurdles, a trial. Thanks for showing that 'space' is about 'space' in one's heart first and foremost.

Pam Brittain for being a loving and faithful 'grandmother' to Julie, and for believing in us.

Holy Trinity Church, for your fellowship, your prayers, your concern. So many of you to thank. To mention just a few, Diana for prayer fellowship, Mary for accomodation, Harold and Marion Parker for your concern, Charlie for help with computer and kids club-(Julie), **Simon Hopkins** for your wizardry with the Computer, the Thursday Women's group at the home of Julie Wakefield, the Tuesday prayer group at the Vicarage, the prayer chain, the

Monday prayer Triplet with Jean Barrington-Ward, Rosemary and John Barret for your friendship and hospitality. **And Collin Millard** for faithfully having the church doors opened at 9.00am to all and so I could always have time alone with God.

Rev. David A Urquhart, Vicar, Holy Trinity Church. Thank you for your concern for Julie and I and for allowing us to invade your 'space'. We are deeply grateful.

Frank and Rhona Goveia (IFES FAMILY)-London; You were, there and I knew I could turn to you. Thank you for always seeking me out when I was 'down under.'

David and Judith Cule (Rotary and Inner Wheel) For your friendship and support and for 'walking' with us to our final goal, with humour and so much laughter along the way.

Colleagues

Ambreena Manji for providing the stepping stone into my work with your help and keen interest and showing that 'Microsoft, Word 7' could be conquered. You too, will definitely make it.

DRs(Law-University of Warwick), Mary Maboreke(1996) Janet Macharia(1995), Lawrence Tshuma(1995) through your struggles and perseverance, I saw what to expect and knew it could be done. Also Miriam Matembe(LLM) (Member of Parliament and Minister), Gorette N. Thank you for your encouragement.

The Uganda Contingent.

DRs Lillian Tibatemwa-Ekirikubinza(1995), Margaret Mangheni(1995), Peninah Dufite-Ndazimana(1996), you sacrificed your families in pursuit of academic excellence, but it soon passed. Thanks for encouraging me with your courage and friendship.

And,

Jessica Khaawa, Rev. (Uncle) Sam Tumwesigire, Eve Aol Ojok (sister), Joyce Kahunde, Florence Mutonyi, Jim Rex, Peter and Elizabeth Asimwe, David B, Rev. Dr. Vicki Owens. It's been hard to be away from all of you, truly you are my *soul* friends. Thanks for the depth of your love.

And,

Frances Owiny, more than a friend, you are like a big sister, sometimes a mother, in our loss 'widows among widows', we found a common bond in the Lord.

And,

Friends at St. Francis Chapel and Makerere University, for your prayers and concern.

Reverend Dr. David Zach and Dr. George Piwang-Jalobo. Thanks for being 'very big brothers' with very big hopes for Julie and I and for keeping an eye. You'll not be disappointed.

Sponsors

The World Bank (1992-4) and, a very Special thanks to Kulika Charitable Trust and Mevellyn Hall Trust, the University of Warwick, School of law and Holy Trinity Church, Coventry, for rescuing me when I was stuck.

The Research Work

A special thanks to Save the Children Fund for your help with transport and field assistants, Margaret and Christine and, David the driver, and Ngabirano F, Juliana S, Mandama for your assistance. And to Catherine, Percy Tuhaise on ' Women and Inheritance Projects.'

And late Dr Jennifer Okumu-Wengi(Ph.D.Law July 1997); you who once helped me through the biggest crises in my life, we were going to celebrate. You've left a gap.

***** To all the women who shared their experience, some who have since died,** I'm deeply indebted.

Last but not least- Family : Mum, Dad, James, Florence, Charles, Judith, Stephen and Kerry, Eve and Brenda, and family members. I knew you were always there believing in me, hoping. Thank you for *your all round support*. My love to you.

Abbreviations

AG	Administrator General
Cap.....	Chapter (For statutes)
CGR.....	Central Government Representative
DA.....	District Administrator
DES.....	District Executive Secretary
EACA.....	East African Court of Appeal (Law Report)
HCB.....	High Court Bench (Law Reports)
NRA.....	National Resistance Army
NRM.....	National Resistance Movement
RC.....	Resistance Council
WLEA.....	Women and Law in Eastern Africa
WLSA.....	Women and Law in Southern Africa

Statutes

Administrator General's Act (Cap. 140)

The Administration of Estates (Small Estates) (Special Provisions) Decree, 1972 (Decree No.13 of 1972).

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Constitution of the Republic of Uganda 1967

Constitution of the Republic of Uganda 1995

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The Judicature Act 1967 (Act No. 11 of 1967)

The Magistrates Courts Act of 1970 (Act 13 of 1970)

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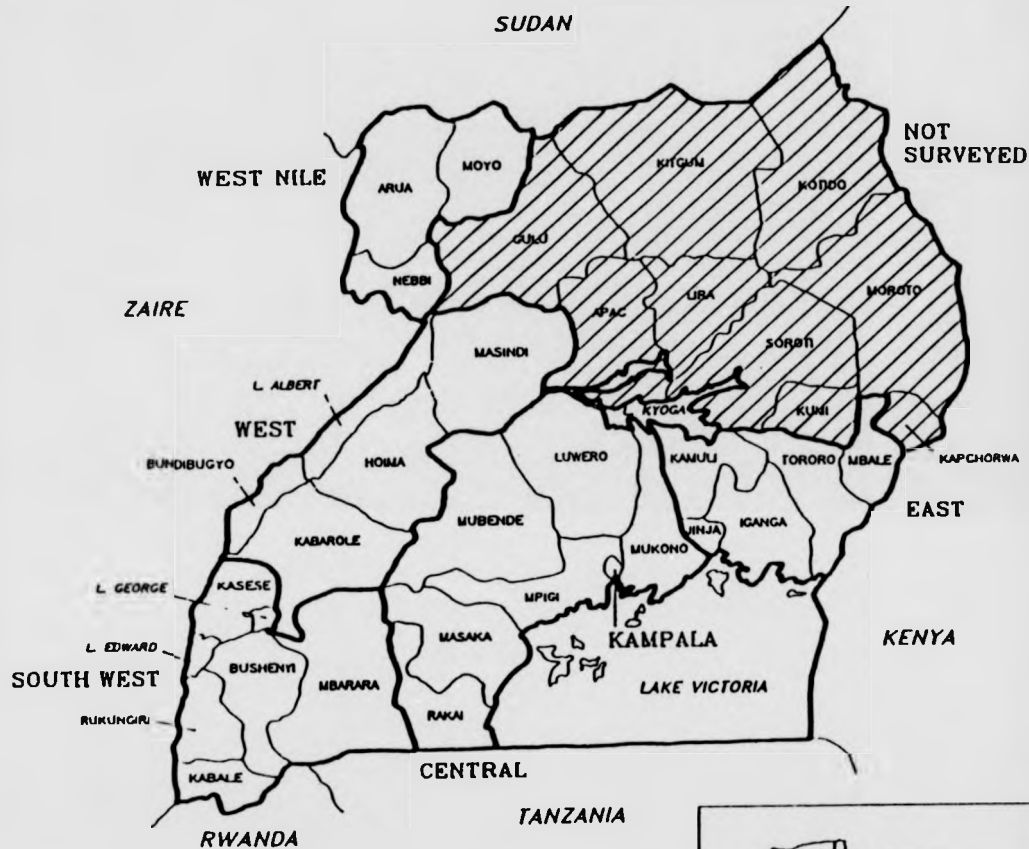
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 Farsia Rwabaganda v Donato Bahemurwabusha (1978) HCB 244
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 Male Christine & another v Namanda Sylifiya Mary and another 1982 HCB 140
 Musoke and others v Head of the Nsenene clan and another. HC Miscellaneous Application
 No.13 1949
 Re Southern Rhodesia [1919] AC 22
 Uganda v Jemina Kyanda (1977) HCB 111
 Re Suleimani Serwanga Salongo, Deceased (1972) ULR 122
 Uganda V Eduku (1975) HCB 359
 Alai v Uganda (1967) EA 596
 Re Mohamed .H. Vasila v Sophia (1920)ULR 26

TRIBAL TERMS for the Baganda.

- Buganda.....the geographical region
 Muganda.....person (singular)
 Baganda.....people (plural) (one of the ethnic tribes)
 Luganda.....the language

Uganda



The map shows the districts in Uganda.
The field work was done in selected areas in
Masaka and Rakai districts, west of L. Victoria



CHAPTER 1

THE DILEMMA OF WIDOWHOOD

"...despite what society may impose on her, *a widow's own self perception* is perhaps one of the most important elements which affects her position socially and economically after her husband's death. *If she is prepared to assert her rights* socially, economically and legally and to pursue courses of effective mediation between herself and her husband's family where there are problems *then she can to a large extent control her own fate*. Likewise where there are family members who are supportive of her position and try to ensure that she is fairly and justly treated, many of the problems that are experienced by widows can be alleviated."(emphasis mine) (Ncube et al 1995 : 35-36)

Part I.

1.1 The Uganda Experience : An Introduction

This thesis is concerned with the social reality of widowhood in Uganda. It considers the ways in which women tackle their changed circumstances which arise at this time particularly the extent to which they assert themselves to protect their rights. The research develops the perspective advanced by researchers associated with two legal research projects in Eastern and Southern Africa, WLEA (Women and Law in Eastern Africa) and WLSA (Women and Law in Southern Africa), that the widow's own self perception is important in determining the extent to which she will pursue her rights. The thesis concentrates on the actions a widow takes to secure access to and control over property in the dispute regulation fora available in Uganda.

Widowhood by definition is a product of marriage. It is therefore necessary to consider the social, economic and legal context of marriage itself in order to understand the consequences that follow in death. The society in Uganda has strong cultural roots in the tribal system. Marriage and widowhood therefore involve a set of relations that the society is interested in and are a part of. A woman passes through the stages of marriage ceremony, married life and the death of her husband which involves her

community. The thesis will show the implications of these stages on the roles imposed on her by society and her responses to them.

Uganda is primarily a rural society with an urban minority. The economic activities and the social background of the women vary within the rural/urban environment. The research considers the rural woman and the urban middle class woman to provide insights into the differing responses to widowhood in view of their different set of circumstances.

Uganda has a plural legal tradition based on customs, English law received during colonialism and currently, new structures of Resistance Councils introduced by the present government of President Museveni to usher in democratic participation and control of decision making by the people in view of Uganda's political history of civil wars. In addition, this Government has actively supported the cause of women's rights which had been in the agenda of previous governments. The initiatives to introduce processes, through Resistance Councils, which encourage local informal dispute resolution that recognise the gender policy of the Government provide the important background to this study.

This chapter sets the scene for the rest of the thesis. Through examples it highlights issues in widows property rights from a variety of perspectives. Two are selected from the fieldwork interviews of urban and rural women, two from the most widely read newspapers in the country and one is a personal experience of the researcher. These examples reflect the four geographical regions of Uganda and are intended to give an idea of the widespread nature of some of the experiences that individual women face at widowhood. In the body of the thesis, the research concentrates on an exploratory study of the problem as it affects Baganda women. There are 56 ethnic groups in Uganda with the Baganda as one of the largest groups. The overview in this chapter

therefore places the experiences of Baganda women in the context of the prevailing situation in Uganda. It also provides the social, political, economic and legal context of Uganda, in particular focussing on the policies of the Museveni government since it came into power in 1986. Lastly it discusses the framework for the research which emphasises the need to uncover women's actions rather than assume as previous studies have tended to do, that women particularly rural women are passive victims.

1.1.1 Rural Experience

(a) Respondent 4, a Muganda by tribe and from Rakai District (Southern Uganda)

Profile: Age: 27yrs, Marriage: *customary*, Year and Cause of husband's death: *Dec. 1993, HIV/AIDS*, No of children: 3, Level of Education : *Primary 5* .

"When my husband and I started our home, we were in Kampala, the capital city doing some business together, selling second hand clothes at Owino Market. Together we acquired a lot of household property. We also bought iron sheets to roof the house we planned to build in the village. I had two children then. When my husband became ill we moved from Kampala to the village in Rakai with all the household property. He died before we began building the house. I was expecting our third child so I returned to my parents where I am now. My baby is now a month old. The other two children were taken by their paternal grand parents to be looked after.

At the Clan meeting, my husband's clan said he had made a will. But I think the will was forged because it stated that he had no wife and that I should be chased away. They therefore denied me access to our property. But I am his wife and I'm entitled to property. We acquired the property together. With my parents encouragement, I immediately went to the Resistance Council (RC 1) with my case and they decided that I should be given some of the household property. The in-laws agreed but later changed their mind.

A para-legal arm of a Non Governmental Organisation (NGO) called CONCERN which works in our district heard of my case through people in the village. They advised my in-laws and I to go to the Probation Office. At the meeting with the probation officers, the in-laws agreed but did nothing. Through the Probation office the matter was referred to court and brought before a Magistrate. The court decided that I should be given some of the property. It gave the percentage distribution of the property and handed the court order to the Probation office to handle the handing over of property. However, up to now, I have received nothing. I also do not feel well enough to keep chasing after the property.

1.1.2 Urban Experience

(b) Respondent 5, a Muganda by tribe and from Masaka town/district. (Southern Uganda)

Profile : Age: 32yrs, Marriage : Islamic, Year and cause of husband's death : *1989, he died after a long illness*, No of children : 6, Level of Education : *Primary 7*

"My husband was a driver for some people in business. At the time of his death in 1989, he had started his own business and was an exporter of coffee. The in-laws took all the household property, except our few belongings like clothing, saucepans and plates. They also wanted to take the residential house which my husband and I were building and was not yet completed at the time. I took them to the RC and then to court through the Administrator General (AG).

My husband had left a will but his Clan did not respect it. I have a copy of the will. Fortunately, I was able to hire a lawyer with some money from my husband's business. The Lawyer assisted me to get whatever was left. The rest of the property had been misused by the in-laws. Through the AG, I was given a piece of land from my husband's estate, and the residential house which I've now completed building. I started a small business through loans from sympathetic friends. This has assisted me in completing the house. I'm now struggling with a small grocery stall at the Taxi park. The city council wanted to evict stall owners so I struggled with my case all the way to the Mayor of Masaka and he was sympathetic, that's why I'm still here.

I'm also Secretary for RC1 of my zone. I've had some recent para-legal training on how the law affects women. A lot of women come to me with their problems, especially widows and I assist them because of my experience as a widow. The RCs are useful because they are the ones who assist you to get to the AG and court. Those who start with the RC usually get better assistance than those who start in the courts. In the RC court we sit at least once a week every Wednesday afternoon. RC1 are very important in settling disputes because they are near to the people. The court is expensive and slow but once it takes its course, it helps at least. Lawyers are useful but very expensive."

1.1.3 The Wider Experience

(a) "Widow triumphs in property fight"
(Monitor Newspaper ; Friday 16/9/ 94. Pg.4)

"Attempts to deprive a widow, Naula Anna Mary of Akisimi parish, Kamake Subcounty, (in Eastern Uganda) of her late husband's property by the heir, were on Sept 1 thwarted by the office of the Central Government Representative (CGR) in Pallisa. The Pallisa CGR convened a meeting for the Irarak/ Rokiorkio Clan and the RCs and read to them the 'Law of Inheritance.'

According to the Clan leader, Opedo James, after the death of their brother (name withheld) the Clan sat and requested the widow to choose her 'guardian' (*man to 'inherit'*

her). Naula then chose the deceased's brother called Alfred Aisu oblivious of the fact that he was a wife beater.

Aisu repeatedly battered her and she had kept reporting to the area RC1 chairman, Okundo Albert Okello, who tried to reconcile them and failed.

During the Clan meeting the CGR warned people who despise the RCs, and promised to have such people prosecuted in a court of Law if they erred. What however shocked the gathering was a surprise reading of a pamphlet published by the Ministry of Women in Development, Culture and Youth, about the Law of Inheritance. The widow was saved from Aisu's wrath by two clauses ;

"A widow is not property and cannot be shared or given or taken by another male relative of a dead husband though she can decide freely to re-marry even within her former husband's clan." "A widow has the right to live in the dead husband's home till her death or till she remarries. Any body who tries to send her away breaks the Law, and may be sent to prison."

This left Aisu disarmed and the widow triumphant. On the distribution of the deceased's property, Aisu got the shock of his life when he was told that as 'heir' he was to get 1% of the deceased's property, the widow 15%, relatives 9 % and the two children of the deceased 75%."

(b) "Widow killed over Estate"

(New Vision Newspaper Tuesday 28/7/92 pg.3)

" A widow died instantly when her brother-in-law accompanied by his father and sister, cut her on the head with an axe following a long standing dispute as to who should administer the estate of the widow's late husband.

Florence Kemitongo was cut on the forehead on July 23 in Kisenyi, a slum area in Fort Portal town, (in Western Uganda) by her brother-in law. Samuel Kandole, according to the Kabarole District CID (Central Intelligence Department), Detective Assistant Superintendent of Police, Abudalla Muballe. He said Kemitongo was the wife of the late David Kiiza who died about two years ago. Muballe said Kandole reported himself immediately to the Police after murdering his sister-in law. Kandole's father, Yosefu Katuramu and Kandole's sister, Kamakune have also been arrested and will assist Police with investigations.

The CID boss said the murder originated from a property dispute which had been going on between the widow and her father-in-law's family since the death of her husband. Muballe said that the late Kiiza left 10 children from different mothers of whom 4 belonged to the late widow. He further disclosed that she was looking after some of the other 6 children in addition to her own. He said the major cause of the problem was the wrangle over a shop on Babiiha road in Fort Portal and a house which Kiiza had built in Kisenyi. Katuramu and his children wanted the widow to leave the shop and house for their own use.

One week after Kiiza's death, Katuramu, Kandole, and Kamakune immediately went and

opened the shop and started operating it. They gave no assistance to the widow. The CID

officer said they also stopped her from cultivating the shambas (gardens) which the late

husband had left behind, as she used to do before he died. "Then circumstances forced her

to apply for letters of Administration and court granted it to her," said Muballe. He however added that she was supposed to administer her late husband's estate jointly with her father-in-law Yosefu Katuramu. But Katuramu's sons are said to have objected to this. They wanted her to leave the house and shop completely. He disclosed that the late Kemitongo was staying behind the shop and had sub-let some rooms to enable her get funds to feed the children.

1. 1. 4 A 'Widow' among Widows.

The Researcher; An Acholi from Gulu in Northern Uganda.

Profile: Level of education: University; Lawyer : **Worked as Magistrate;** also Lecturer in Law.

Marriage; Customary ceremony (giving of bridewealth) followed by church wedding ceremony, in 1984; Former husband died in 1993 shortly before field research began.

(e) Personal experience

Two weeks before I was to begin my field work my former husband died. In the eyes of my in-laws, I was his widow. Based on what I had heard in and out of court in my experience as a Magistrate and lawyer about the treatment of widows and property, I naturally expected the question of property to figure prominently and to be an observer of the wrangles that would follow with the 'in-laws'. My 'in-laws' however went out of their way to plead with me to be joint Administrator of the deceased's property, with three brothers of the deceased, selected by the elders in his family and also to take care of the moveable property in his home. Our marriage had fallen apart because of a crises in the marriage. I also had my own property. I was taken by surprise! However I firmly declined not wanting to leave room for any future intrusion into my life through strings attached to property. The in-laws respected my wish but insisted that I should give them some advice concerning the deceased's assets. They certainly needed no advice especially with one of the brothers of the deceased being a Principal State Attorney in the Ministry of Justice in the country. They prevailed on me to return to what was once the matrimonial home and to his office where he had been Managing Director of a Corporation, to sort out his personal effects. A sister of the deceased who had travelled 200 kms from the village insisted on being present. She touched nothing leaving me to do the sorting but kept a watchful eye on her deceased brother's assets. The role I played was out of their insistence on my status as 'widow' and the relationship I had maintained with them irrespective of my differences with their deceased brother.

The day after his funeral I found myself facing about 40 members of the deceased family (Clan) most of them men. They comprised of civil servants, officers in government, leaders in RCs and the ordinary person in the village. As his 'widow'

they wanted to discuss the future and to hear my opinion. Some of the elders (*elders are custodians of culture*) declared that as far as they were concerned the 'western law' could not set aside a cultural marriage (*I had gone through both a cultural and a church ceremony*). Only they could set aside the marriage, on return of the bridewealth as required by custom. Bridewealth was never fully paid in my case but my parents as practising Christians had put more emphasis on the church marriage and not pursued the fulfilment of the requirement of bridewealth. The western (and written) law that I had mastered so well, was teaching at the University in the Faculty of Law and had applied in my work experience as a Magistrate and also sought to apply to my current experience was thrown out of the window by greater and unpredictable social forces on the ground.

The 'in-laws' through a representative applied to the Administrator General (AG) for letters of Administration because the Will of the deceased had mysteriously disappeared. The AG's Office declined to grant the letters until they had personally spoken to me. Again this too came as a surprise to me. As a lawyer, I was aware that legally, a widow was one of the persons who had priority in the administration of her deceased husband's estate unless there were circumstances to the contrary. What came as a surprise was the effort of the AG's office to ensure that a widow of the deceased was catered for, something which I had not yet come across with my interactions with widows I had known. I reassured the AG's office that I had declined and had not been intimidated nor coerced by the deceased's family into not administering his property. They were surprised too! Their experience was that widows were often intimidated into succumbing to the wishes of the in-laws.

Some of my female colleagues in the legal profession were disappointed with the stand I had taken. I was defeating one of the very purposes, '*The right of a widow to inherit property*', for which a Legal Aid Project was started in March 1988 by the Uganda Association of Women Lawyers (FIDA- UGANDA). I was a member and had one time been acting Chairperson. Although I appreciated their concern, I insisted that mine was an individual case and peculiar to me. I was a professional woman with a white collar job (let alone my legal background). I lived in my own apartment and had acquired my own personal property. The question of where to live or of property or financial assistance did not arise, even for the only child of the marriage, who had lived with me all along and was six years of age at the time. I had however left the issue of whether the deceased's family would give her a share of property to them. I advised the in-laws to settle the property among themselves and to ensure that his beneficiaries were catered for. These factors, I sensed also contributed to the peaceful handling of the deceased's property. An elder brother of the deceased therefore gladly took all the moveable property from the house in the city, to his hut, in the rural area, to the dismay of the other brothers, who saw the property as going to waste.

According to cultural practice, as I was told by the elders, a surviving widow could choose to be 'inherited' by a brother of the deceased or remain as she was if she so wished. She was still taken to be part of the family. I was told by the elders in the community that the practice was intended to cater for the well being of a widow and her children. The person who took her would be responsible for their well being. Also if the widow was young it would allow her to have children and so continue the family line within the deceased's family rather than marrying outside his clan. I was told I was

still young and besides I had only one child. This cultural practice is dying a natural death although among the rural community it still prevails but at a low scale. My late father-in-law was a former chief with 16 wives in his life time and had several children including adult sons. Had I opted to be '*inherited*,' I would have had quite a choice! I was certainly given the option. My decision was respected but they insisted that I should not hesitate to turn to them for any help I needed especially for '*their*' daughter, my child. To the present time, they still insist on referring to me as their late brother's widow.

As a researcher (*us*) I was going into the field to investigate the experiences of '*them*', the widows. But now I was both '*us*' and '*them*.' Still grieving and having been faced with unpredictable experiences, I went into the field with several questions in my mind which are set out in the Methodological chapter.

The scenario painted in the five examples given is a reflection of *some* of the common experiences that widows face in Uganda but the *detailed* experiences, as revealed, are varied and are explored further in the case studies in the body of the thesis. There are instances where a widow has peaceful enjoyment of her deceased husband's property. It is also rare for a widow to be killed. The unlawful killing of a person carries the death penalty under the Criminal law of Uganda (the Penal Code Act). But the 'tug of war' over the deceased's estate where he is male, is central to and remains the 'crises' of widows, as reflected above.

Widowhood was selected as a primary focus of the study because it is generally perceived as an area where women are subordinated and are '*passive or helpless victims*' and seemingly unable to assert themselves and therefore control their lives. The examples given of the experiences of individual women from the four regions of Uganda, reflect instances where they made decisions and took some course of action, which had different consequences for each of them depending on their perceptions of themselves and their situations, what the cultural practices in their societies imposed on them and their choice of action.

As a reflection of what widows go through, this thesis explores the experiences of individual widows from Buganda, within their specific local cultural context, to determine the extent to which they are able to assert their rights at the death of their husbands. It investigates how they understood and interpreted their situation at widowhood, how they perceived themselves in that context, what they did about their situation and why, what factors influenced their actions and the consequences for them. The thesis pays particular attention to the presence of and the interaction between the cultural, social, legal and political regulatory regimes that structure the society under study. The regulatory regimes are part of the societal cultural structure such as the clan/family council which is the guardian of culture and custom. Other regulatory regimes are created by the State, for example the Resistance Council (RC) which is a Government structure with executive and legislative powers to facilitate democracy and decision making from grass roots at village level to Parliamentary level. There are also the offices of the District Executive Secretary (DES) and the Central Government Representative (CGR) which have administrative and political powers respectively, over districts and facilitate the functioning of the Resistance Councils. Their creation and functions are described in greater detail in Chapter 4. Within the Ministry of Justice there is the Administrator General's office and the courts which handle the administration of the estate of the deceased. These regulatory regimes play a significant role at inheritance and especially within dispute settlement. Widows pick and choose from these regimes according to their needs and abilities. The thesis also explores how a widow is conceptualised within the regulatory regime to which she takes her case and the responses to her actions. This allows for a realistic perception of a regulatory regime and the degree of control it has over a woman at particular moments in her life, and the extent to which the regime is enabling or constraining on her ability to assert her rights.

1.1.5 Government policy and strategy for socio-economic reform.

This study was carried out between 1993-1995, at a time when the current National Resistance Movement/ National Resistance Army (NRM/NRA) of President Yoweri Kaguta Museveni which took state power through a military coup in 1986 had made significant strides in ensuring political stability and improvement in the economy thereby allowing the government to advance changes in the structure of the country and in the economy. However, from 1970 until 1986, Uganda went through several political conflicts that often resulted in civil war and devastated the infrastructure and radically reversed the economic and social progress that had been attained in the 1960s (National Population Policy for Uganda:1995). At that time, Uganda had a Gross Domestic Product (GDP) growth rate of 5 per cent, one of the highest in Africa. Between 1970 and 1980 the GDP declined by 30 per cent, a rate of 1.5 per cent per annum. This left the Government unable to finance investment internally and it was forced to turn to external borrowing and donor assistance for investment. It worsened the Country's external debt burden which in 1992 was equivalent to a total debt stock of US \$2.6 billion equivalent to 100% of the GDP and 14 times the level of export (Population Policy Document:1995). The debt burden to be borne by the population became unsustainable. The limited resources, coupled with a growing population and a low per capita, led to a marked erosion in the standard of living.

A year after taking power, the National Resistance Movement Government found it necessary to introduce the Economic Recovery Programme (ERP) for economic stabilisation, structural reform and gradual economic growth. As part of this programme the Government drew up a Rehabilitation and Development Plan (RDP). For the 1993/94-1995/96 period, it embarked on special programmes of expenditure prioritisation to increase financial budgetary allocations to social services such as

primary health care especially in the light of the AIDS epidemic (see Chapter 3, and also reflected in the research findings). There was also grave concern over the number of deaths among children below five years of age, from malaria, malnutrition, HIV/AIDs through transmission from mother during pregnancy, and lack of immunisation. The deaths among children reflected more than half of the deaths in the country each year (Population Policy Document 1995). Increased budgetary allocations were also needed for primary education, family planning, nutrition, water supply and sanitation, among others. In particular, these programmes were geared towards addressing the special needs of rural women, the urban poor, children, widows, orphans, demobilised soldiers, retired workers, the elderly and persons with disabilities. Demobilised soldiers were a major part of the RDP. About 3 years after the NRM/NRA took power, it came under pressure from the IMF (International Monetary Fund) to demobilise some soldiers because of the enormous financial expenditure incurred in the continuous maintenance of the army especially when there were real signs of political stability. The NRM/NRA had also recruited children below 15 years of age during the war it waged against the then government and was under pressure from the UN to rehabilitate them especially into schools and training institutions. The Government also found it necessary to overhaul the Civil Service in 1990. It discovered that there were ghost employees as well as many who had reached retirement age (55 years) and proceeded to retire them. Others were retired because of corruption or inefficiency. The Government also encouraged any person who wanted so to do, to retire from the civil service with a 'Retirement Package.' The effect of these programmes was the release of monies to improve the social structure (Budget Speech 1994/95).

The year 1994 saw a 5 per cent growth in the GDP and inflation of less than 7 per cent in the economy (Budget Speech 1995/6). The 1995 report of the Economic Commission for Africa commended Uganda's economic growth as the most impressive in Africa with a strong performance on inflation. It was ranked as the 13th fastest growing economy in the world. In February 1995, Uganda became the first developing country to receive the 'Naples Terms' on a final settlement with the Paris Club Creditors (the G7 countries then, currently G8 with the inclusion of Russia). Naples terms are available only to developing countries showing exceptional improvement in economic performance and fiscal adjustment. The terms involved a reduction rather than just flow restructuring of debt service due. For Uganda this was equivalent to a write off of US \$71 million. At the end of December 1994, Uganda's total stock of external debt was US\$3.5 billion representing 60 per cent of GDP. In terms of income, there had been growth since 1986 which had increased real per capita income by 20 per cent to \$170 in 1995. However this level was still 23 percent below the level enjoyed by Ugandans in the 1960s although an improvement from the 1980s.

1.1.6 Socio-legal development : Political stability and democracy.

Another important concern of the ERP was the need for political stability and the implications of this on population growth and political development. A population census was carried out in 1991. It was found that the population of Uganda stood at 16.7 million having increased from 4.9 million in 1948. Between 1971 to 1978 the population had grown at a rate of 2.8 per cent. The census revealed that there was a decline in the growth rate to 2.5 per cent per for the period 1980-1991. It was generally accepted that the decline was mainly due to the years of political conflict which resulted in a large loss of life (Population Policy 1995).

In 1988 the government embarked on the making of a new Constitution that would ensure democratically elected Governments and so protect the lives of the population. This received overwhelming support in a country that had experienced years of tribal conflicts and military coups. The revelations in the decline in the population added urgency to the need for democracy in the country. A Constitutional Commission was set up in 1988 to solicit public views on provisions to be included in the new Constitution. This would revise the 1967 'Republican Constitution' as it was known then. The Commission carried out a country wide research involving all sectors of the community from grassroots, including the most vulnerable such as the elderly, those with disabilities, children, women and the youth. The programme also included handling the more difficult issues of political parties and the treatment of political prisoners and rebel/guerilla movements. The major debate centred on political parties. The government of Museveni felt that multi-parties were divisive and not suitable for the diversity in the ethnic tribes in the country. They argued that the political history of Uganda showed that parties were organised along tribal and religious lines. This had encouraged tribal divisions and conflicts leading to civil war rather than bringing unity. Consequently the government insisted on a one-party system and created what it called '*The movement political system*' which was broad based, inclusive and non-partisan. It then proceeded to invite and include representatives from all known political parties including rebel movements that were willing, into Parliament. For the rebel movements especially, a one year amnesty was given to surrender, followed by decommission of arms. Most rebel movements agreed to this. However, political parties were generally against having a one-party system. On taking power the government had suspended all political activities. This was seen by political parties as a violation of the freedom of conscience, expression, assembly and association and as such a hindrance to democracy. However through 7 years of the Constitution making process, involving

dialogue with various factions, this resulted in the promulgation of the Constitution in September 1995. Consequently some of these issues were laid to rest. Although the '*Movement political system*' was adopted, the new Constitution provides that the people of Uganda shall have the right to choose and adopt a political system of their choice through free and fair elections (Article 69.(1)). The choice of political systems are spelt out as *(a) the movement political system, (b) the multi-party political system and (c) any other democratic and representative political system (Article 69.(2))*. A referendum was to be held for the purpose of changing a political system (Article 74.(1)). Uganda's history had for 20 years seen change through military coups. The Constitution also spells out the principles of the '*Movement political system*' which is to guide the nation through these new developments. It is 'to conform to' *(a) participatory democracy, (b) democracy, accountability and transparency and (c) accessibility to all positions of leadership by all citizens (Article 62(2))*. A major part of the policy and task of the government was therefore to decentralise political power. This was done through the creation of structures that would encourage popular democracy and popular justice from grassroots and would encourage the ordinary population to participate in political development. The government had already embarked on some measures to ensure this. In 1987, a year after taking over state power, the Government enacted the Resistance Councils and Committees Statute (Statute 9 of 1987), to empower the population to make decisions about their political and social life through executive councils known as Resistance Councils (RCs). This political structure begins at grassroots at the village level and through elected representatives to District level and finally to the highest level, where it sits as Parliament and is called the National Resistance Council (NRC) and also forms the National Executive Council (see Appendix 4.4 in Chapter 4). These structures are empowered to hold elections at their levels and to make decisions about their economic,

social, legal and political life. The State however sets limits on their powers and monitors this through the Executive Committees of the councils. Through these structures, representations are made from village level to District level and then to Parliament. The history of the development of RCs and its implications for political development are discussed further in Chapter 4 and Chapter 10. There is a clear indication that the State sees it as the structure for Local Government and as the means through which change and continuity will occur and as the means to democracy.

An important aspect of these macro policies is the special focus on women, given that 51 per cent of the population are women. The next section charts the history of women's involvement with the development of Uganda in order to set the study of widows in the wider political context.

1.1.7 Women in development; a history

As early as 1947 during the Colonial administration, a structure known as the 'Uganda Council of Women' was founded by a group of women, with the aim of mobilising women from all over the country to work together to safe guard and improve their family life (Mwaka.V: 1991). This Council saw the role of women as being primarily mothers and housewives and it had a welfare oriented policy. The outlook of the Council was in line with the climate of the times then. After the second World War, poor women in the third world were targeted by international and national relief agencies as main beneficiaries of welfare programmes designed to relieve poor women's needs exclusively in terms of their roles as mothers and housewives.

In 1961 at the 'Uganda Women Look Ahead Conference', women expressed concern about the economic structure that made them totally dependent on men without providing security when men died (Mwaka V:1991). At this pre-election conference, before Uganda's Independence in 1962, women were urged to vote for a person they considered would best

represent their interests. The Uganda People's Congress (UPC) headed by Dr Milton Obote won the elections and did indeed receive a massive vote from women. It formed the new Government of an independent nation. UPC began to play an important role in promoting policies and programmes for women through the establishment of the Department of Social Welfare and subsequent Community Development Scheme. During the period 1962-1972 the programmes of the Uganda Council of Women ranged from creating political awareness amongst women, to demanding equal rights and opportunities, lobbying for legal rights and then back to welfare oriented activities. An important change in the women's organisation was that it was no longer concentrating on purely welfare oriented activities but was also creating political awareness amongst women. Women's perception of their needs was clear. They wanted;

"Equal opportunities in public life, equal opportunities for girls in education, a planned programme for further education for both women and girls who have left school, more short term overseas scholarships for mature women, more vocational opportunities, revision of legislation detrimental to women, provision of hospitals and better maternity care."(Mwaka: 1991).

In 1978 the Government changed the Uganda Council of Women to the National Council of Women. Internationally this was the period of the United Nations (UN) Decade for women (1976-1985) and Uganda, like several other member countries, had responded to a UN recommendation to every member state to set up an organisation within their government structure to oversee and accelerate the achievement of equality for women and their full integration in National Development. The integration strategy adopted by the UN was based on the assumption that women were not yet making a full productive contribution to the development of their societies and that, if planners made an effort to take women into account, conditions would be created for women's equal partnership in development. Women would be able to share the benefits of development and would also be able to influence decision making (Mwaka: 1991). Third world women scholars however

criticised the integration strategy for its failure to understand women's lives and work in the third world. Okeyo (1989) observed that ;

"Historically African women have been active in the provisioning for their families. This is a role which they play today although they are being constricted in their effort to feed their families by multinational corporations in food processing and agricultural business."

They also argued that this strategy avoided any attention to integrating men into the work of the family and the main economic sphere.

The UN Decade ended with a world conference for women in Nairobi, Kenya in 1985 with a call to member states to ratify the Convention on the Elimination of All forms of Discrimination against Women. Uganda participated in the conference and in line with its policy to improve the status of women ratified the Convention in July of 1985.

1.1.8 The NRM / NRA Government's policy for Women.

When the NRM/NRA took state power, President Museveni continued with the policies of the deposed Government on women. It aggressively pursued policies that would bring women into decision making. At the political level, the government initiated moves to ensure the integration of women in political and social development. To ensure women's involvement, the Government reserved in the 1987 RC Statute, one out of the ten places in the RC Executive Committee for a woman at every RC level. A woman is also free to compete for the other nine positions. Through affirmative action at national level, a woman was elected from each of the 39 constituencies (Districts) in the country into the NRC. This was and is intended to encourage women from every district to have a political voice in Parliament through their women representatives. These steps by government began to *provide women with forums that had been missing for them to assert their rights and so make their 'voices' heard.*

1.1.9 Directorate of women's affair

In 1987, the Government also proceeded to establish the Directorate of Women's Affairs in the NRM Secretariat. The Secretariat is the main political wing of the Government. Consequently the Women's Directorate was and is still intended to mobilise women to participate more actively in politics. This includes the training of women cadres in charge of women at District Level. Through the NRM Secretariat, employees of the civil service and parastatal bodies with the assistance of RCs organise political education seminars in their districts and villages. The seminars generally encourage women to play an active role in the management of their community's development. This has been reflected in their active involvement in the election of their female District representatives to parliament, their recommendations to the 1995 Constitution of Uganda and the general elections of 1996. In the thesis, it is reflected especially in their use of Government structures such as the RCs at grassroots to assert their rights.

~~1.2.0~~ The Ministry of Women

1.1.10

In February of 1988, a Ministry of Women in Development was created by Government in response to women's call for a fully fledged Ministry to oversee the integration of women in government policies and programmes. The 8th of March was declared National Women's day and made a public holiday, a historical time in the history of the country. At the launching of this day in 1988, President Museveni spelled out his government's policy in creating the Ministry of Women. He declared that ;

"The broad objective of the Department is to ensure the integration of Women in Development, the target being the total emancipation of our women folk".

He appointed 9 women Ministers into his cabinet. Up to this time there had only been one woman Minister in the Government shortly after independence in 1962 and none since the

1970s. However the late 1990s have seen a reduction in Cabinet ministers, and therefore of women to 4, in an attempt to cut down on Cabinet spending as a result of pressure from the International Monetary Fund (IMF). The Vice President of Uganda is a woman, reflecting Government's policy to keep women at the top of decision making.

In 1992 the Ministry of Women was changed to the Ministry of Women in Development, Culture and Youth and in 1994 to the Ministry of Gender and Community Development. At the same time the National Council of Women was changed to the National Association of Women's Organisations in Uganda in an attempt to reflect the diversity in women's groups. The change to the Ministry of Gender was a result of the political thinking in the country and efforts by the government to integrate gender issues into policies and programmes of all sectoral government ministries. This included the promotion of gender sensitive planning and project design and the development of gender skills analysis by concerned officials. The Ministry of Gender was entrusted with spearheading this task.

This Ministry of Gender also played a significant role during the Constitution making process. Using the RC system, the Ministry of Women solicited views from women across the country which were compiled into a comprehensive document and consulted by members of the Constituent Assembly during the Constitution making. The presence of District women representatives in the Constituent Assembly acted as a safe guard to women's proposals. Consequently the new Uganda Constitution has been hailed by women as giving them rights under the law that they had never enjoyed before. According to Kyokutamba (1994), Uganda has been recognised in Africa as being in the forefront in bringing women into decision making. The Constitution making process was of great significance for women. It revealed that the creation of various organs and structures at all strata of the society including the grassroots, with a clear and direct focus on the needs of women, had begun to (politically) empower women by giving them the *opportunity to*

identify and voice their needs and the means to work towards the achievement of their goals.

According to the report of the 'Recommendations by the Women of Uganda to the Constitutional Commission', (1992 : pg.2-3) ;

- "The participants at the constitutional seminars covered a wide cross-section of women in this country. They can be divided into two categories; the trainers and the trainees. The first category of women were those trained to facilitate the programme. These included, on the one hand, women leaders at higher levels like the NRC (National Resistance Council) Women representatives in Parliament and the RCV (*Resistance council at level Five which is at District level*) Secretaries for women and, on the other hand, women chosen from diverse backgrounds (in terms of place of origin, profession, occupation, experience and leadership role in Women's Organisation or Institutions of Government) The second category of participants were those who were mobilised at the country level in the districts. This category included housewives, women leaders at the lower levels of the RC hierarchy, civil servants such as teachers, administrators, nurses and representatives of women's NGOs and National Council of Women Executive members at the district branches. In a few districts, in the Northern Region like Apac, Lira, Nebbi, Arua and Moyo a sizeable proportion of the participants were illiterate." (*The diversity in participants including the illiterate, reflects the way the RC structure is able to encourage and ensure the participation of all sectors of the society in decision making. See Chapter 4*)

"-women had more to say on issues that affected them directly, particularly on issues related to the fundamental rights and freedoms of the individual and the status of women."

Inheritance featured high on the agenda of women and a summary of some of their recommendations solicited from the four geographical regions of Uganda are quoted below. These reflect some of the cultural practices that are imposed on women by society and what women want done about them. The examples given concentrate on inheritance as this is the emphasis of the research.

(iv) Inheritance and Property Rights pg. 17

(a) All customary practices that deprive women of their constitutional right to own and acquire properties, for example cows, land and other fixed assets should be outlawed.

(b) In the event of death of a husband who dies intestate the property of the deceased should be justly divided. The widow should be entitled to a bigger share of the property of the deceased than 15% provided for in the present Decree amending the Succession Act (recommendations of the percentage ranged from 25% to 50%.)

(c) The customary practice of inheriting a woman by a brother or any other near male relative upon the death of her husband (levirate) should be abolished. The widow should remain with the choice of taking on another husband/guardian from her late husband's clan.

(d) 6 districts from Northern and Eastern region strongly recommended that it should be the constitutional right of a widow to remain in the matrimonial home after the death of her husband.

It was noted that this should apply to all widows whether they have children or not. However, widows should not abuse this right by misusing the house for culturally unacceptable practices, for example staying in the house with another man.

Women bitterly complained that men fight to inherit a widow whose late husband left property which they can benefit from. However, several cases were also quoted where women were abandoned with their children by the clansman of their late husbands because the man died poor. Women commented that the above mentioned cultural practice was meant to assist a widow by providing her with a guardian/ adviser who would also take part in the upbringing of her children and being a "father" to them. This aspect they lamented had been lost. They recommended that levirate should be discouraged because it encourages plunder and misuse of property leaving the widows and their children *helpless.* (*Italics mine*)

Women were also concerned about political parties in view of the hardships and sufferings that women and children faced during civil war and the greater loss of life of their men folk.

They were generally of the view that Uganda "still lacked the political maturity necessary for a multi-party political system." They therefore recommended that there should be no room for political parties until the country had moved away from sectarianism based on tribe, religion and social status, and moved towards nationalism. They generally embraced the one movement system. However 4 of the 39 districts which had suffered greatly during the civil wars, precisely because of tribalism and multiparty politics were of the view that Uganda should have a multi-party system where there was freedom of expression and association. They argued that the diversity in the tribes demanded this and they were concerned about dictatorial tendencies in a one-party system. Concerning the RC system, women generally applauded this as a tool for participatory democracy. They however felt that its role should primarily be mobilisation, political sensitisation and organisation of educational activities that would encourage social and economic development. These views

were incorporated into the Constitution in the light of recommendations from the population at large.

Through these various government policies and strategies for economic and political development for the country as a whole there was emerging a clear and focused commitment to women socially and politically. Women have been quick to grasp this. However the State has to grapple with meeting IMF and World bank conditionalities which go to the root of economic development and affect the implementation of its policies. Uganda has continued to have some positive response from these international bodies.

The Constitution making process and the election of women parliamentarians revealed that women were becoming more politically aware, that they saw the need to be in decision making especially concerning issues that affected their lives. More importantly, that they knew what their needs were and were determined to use the new state policies and structures created to assert themselves. The research explores how they perceive their needs and how they have used the structures within their local cultural environment.

Part II

Focus of the research.

1.2 The "Passive" Victim

Cultural factors within marriage, inheritance, and property rights within a patrilineal society as the one studied, are generally perceived as constraining women because the cultural factors generally represent, though not always, male values and perceptions to which women are expected to conform. However, little appreciation is given to *an individual woman's action* within this environment. Consequently this does not allow for a positive

conception of women. In view of that, the study adopts White's (1988 PhD Thesis) approach in her study of class and gender in rural Bangladesh where women are perceived as *subordinate* in marriage, property and employment relationships. She rejects a "passive" focus on female status as a consequence of subordination for an "active" stress on women's ownership, management and use of resources within the household in what is seen as a subordinating environment. Through case studies she explores *the kinds of transactions* that individual women (and men) are engaged in within the household. This approach reveals the *resource position* of individual women and the *types of activities* in which they engage in, including those which convention or culture declare "do not happen". Consequently the *passive emphasis on the constraints on women* gives way to a stress on their *coping strategies*. She argues that recognising the *individual dimension* of access to resources gives room for a positive conception of individual human actors and their resource position.

The study of Baganda women explores the choices an individual widow makes within her local cultural context to retain or claim property after the death of her husband, rather than focusing only on what society imposes on her, thus revealing the *activity* she undertakes and the resources she uses to achieve a desired outcome. The thesis proposes that a 'passive' focus on the status of women as a 'homogenous' group at widowhood makes invisible their activities and efforts at self determination as individuals. The struggles or the *coping strategies* of individual widows removes the image of the ' *helpless or passive victim* ' but it does not in anyway make simplistic the often harsh realities of their lives. At the core of these activities is *their perceptions of themselves* and what they believe their rights should be.

As illustrated in the examples given from the four regions of Uganda, women adopt various strategies to enable them cope with the reality of their widowhood. The degree to which

they are able to achieve their goal depends on a number of factors, such as their rural or urban location, their relationships with their in-laws, their resource position and the regulatory regimes in place for dispute settlement within their local setting that enables them assert their rights.

Focusing on the widow's self perception and what she does about her individual situation is what is seen by the study as the '*uncovering of her true self*' - *a dismantling of the passive victim*. In the 'uncovering' she begins with the images that society impose on her and through her efforts to assert herself reveals her values and therefore self image.

Seventy persons were interviewed with women as key respondents. Men were also interviewed on cultural practices. Opinion leaders such as clan elders and members of Resistance Councils, legal and judicial officers and welfare officers were interviewed. Chapter 3 gives a more detailed account of the research process.

1.2.1 Framework

In view of the above discussions the analysis adopts a framework that is based firstly on the need to understand women's lives by seeing things *through their eyes*, that is, how *they perceive the context* in which they live their lives. Secondly how *they perceive themselves and their relationships* within the context of their specific situations and how they would like to be perceived. Thirdly it is based on the need to understand the *context* in which women live, that is, how women are *conceptualised within the regulatory regimes in society*, what the roles of these regulatory regimes are in the specific areas chosen for the study, and how the regimes interact with each other and women in those situations. There is also a need to discover the extent to which the relationships between women and the regulatory regimes enable women to assert themselves.

To this end, three approaches are adopted to explore and expose the reality of women's lives.

(a) Women as individuals : The need to move away from generalising women as a coherent group with identical interests and desires irrespective of their historical background, kinship and class among others and the context in which they live, to seeing them as individuals with various backgrounds, needs and interests, and each living within a specific local cultural setting and reacting to a given crisis in the way she perceives the problem and solution. It is a call to look at the subject status of women, that is their perceptions of themselves and their lives, and the activity they undertake as a consequence of that. Until recently there has been emphasis on their object status, that is, how they are subordinated and remain subordinated in crisis situation in their lives - thus the *helpless, passive and silent victim of their circumstances*.

(b) The Context : The need to move from always assuming that the context, that is the cultural, socio-economic, political, and legal regulatory regimes which organise society are subordinating to women in total and, to determine the degree or the pin pointed control these regulatory regimes have over women and when this control is tightened or loosened and why (Dwyer : (1982). Also there is need to examine the historical context in which these regimes evolved and their roles in the lives of individual women and their experiences. In this way, one is then able to determine the extent to which the regulatory regimes provide enabling or constraining environment for women to assert their rights.

(c) Property relationships : To get a clearer picture of the interactions in (a) and (b), property relationships, especially in the exchange of bridewealth at marriage and in the distribution of property at inheritance, is explored. Within this context, the study explores how a woman is conceptualised and the ideologies behind them and how she responds to the way she is conceptualised. It examines her self perception and what she does about it in conflict situations and the consequences that flow from these interactions.

(d) Research method :The approach adopted was to look for various sources of data such as in historical and current documents, field notes, interviews, experiential data and to discover the ideas emerging from the data, what could be deduced from them; whether they verify the propositions or not and what new unforeseen avenues are opened for exploration. This is discussed in more details in Chapters 2 and 3

1. 2. 2 Summary of chapters.

Chapter 2 gives the theoretical frame for the thesis. It examines the literature on the approach to be adopted in studying women's lived realities and argues for the need for specificity, that is examining the issues within the historical and cultural context and giving women a "voice." It explains why 'property relationships' is used as a model of analysis.

Chapter 3 describes the methodology used in the research in trying to fulfil the arguments advanced in chapter 2. Consequently there was emphasis on interviewing women within their local cultural context, and allowing them to tell their experiences in their own words. Other methods used such as documentary, provided the historical and current context of their experiences.

Chapter 4 gives a historical background of the importation of English judicial system during colonial times and its consequence. It also explores the current judicial structure with the introduction of the Resistance Councils (RC) at grassroots to bring justice closer to the populace. The understanding of these regulatory regimes is crucial to the whole thesis because of their influence on women's choices at widowhood.

Chapter 5 gives the anthropological background to the Baganda Culture. It reveals the strength of the clan in the regulation of marriage, inheritance and property relationships. The importance of this historical context lies in the light it sheds on the reasons for contemporary relations between women and property especially at inheritance.

Chapter 6 describes the giving of bridewealth during the wedding ceremony of a Muganda woman and it's implications for her ability to assert herself in marriage.

Chapter 7 analyses the experiences of rural and urban widows when their spouses die and their struggles to retain or claim property at inheritance.

Chapter 8 introduces a different approach to the same issues. It examines two cases one from the rural and another from the urban from text in court records. It explores the extent to which a rural or urban widow is able to assert herself within the court process in an attempt to claim property.

Chapter 9 reveals the place of the various regulatory regimes in assisting women at grassroots to assert their rights. It pays particular attention to the role of law.

Chapter 10 concludes the thesis reflecting on important issues that came to light in the preceding chapters and gives possible directions for the future in the light of current Government policies.

CHAPTER 2

LITERATURE REVIEW

"The desire to understand the lived realities of Third World Women would encourage a search for previously *silenced women's voices*, particularly *their interpretation of the world they inhabit*, their successes and failures and their desire for change. The goals and aspirations of Third World Women would be discovered rather than assumed, and strategies for improving women's lives could be constructed on the basis of *actual experiences and aspirations* rather than modern fantasies imposed by the West." (Parpart J: 1992). (*italics mine*)

2.0. Theoretical and analytical Framework: An Introduction

This chapter explores some debates on the approach to be adopted in studying Third World Women, with specific reference to Africa. The main argument being that generally "feminists from both Western and Third World colonise Third World women by homogenising them, denying them their histories, their individualities and their multiple identities," (Mbilinyi: 1992:46). They "ignore variations in historical experience, economic structures, cultures and changes over time," (Imam and Mama 1988:14 in Meena:1992). Behind these approaches is "the assumption that Third World Women are vulnerable and dependant, and with no history of their own or capacity to define their lives," (Parpart, 1992:15). Consequently studies on Third World Women have *tended to emphasise* women as victims of oppressive patriarchal ideologies and "little has been done to *unveil the degree and nature of women's resistance* against oppressive gender relations," (Meena, 1992:26). This keeps the realities of women's lives hidden and the realities can only be discovered by "uncovering the voices and knowledge of the 'vulnerable' and once that is done, their vulnerability is neither so clear nor so pervasive," (Parpart 1992:15).

What is being advocated is the need to acknowledge women within the context of their lived realities "as authorities on their customs and practices, to incorporate their experiences, values, perspectives and versions of customs and practices" (Armstrong:

1995:11) in measures for reform. This can be discovered by exploring their self perceptions through what they say and do in situations that bring a change in their personal lives such as marriage and widowhood. This is explored in the thesis.

2.1 The starting point of analysis

Until recently most of the female discourse on Third World women has been by Western feminist scholars. While Mohanty (1988) acknowledges the strengths and the important contributions to knowledge on 'Third World Women' by these scholars, she observes that they do not generally give a true picture of Third world women within their particular local cultural context. In general, she argues that Western feminist writers interpret the experiences or lives of Third World women in the light of their own experiences that is, in the context of western standards. Thus Third World women are represented as poor, uneducated, tradition-bound, sexually constrained as opposed to Western women who are educated, modern and having control over their lives. This approach ignores the reality of women's lives which must necessarily include differences among women themselves. "Attention to difference and the language of resistance provides new insights into Third World specificities and undercuts the tendency to apply western standards uncritically to all Third World Societies," (Parpart :1992:15). It requires studies of Third World women which reveal women's lives as *meaningful, coherent and understandable* instead of being infused "by us" with doom and sorrow," (Parpart 1992:6). Stewart (1995) observed that part of the problem lies in the fact that the analytical debates of Western feminism are limited by their non engagement with the work of women in other parts of the world. However the short comings of Western feminists have also spilled over into the writings of Third World middle class scholars. Mohanty (1988) and Parpart (1992) have noted that in writing about their rural or working class sisters, Third World Scholars have also often assumed their middle class culture as the standard and therefore interpreted rural and

working class histories and culture by the said standard. The identical analytical principles employed by middle class Third World women, especially scholars is partly due to the fact that at post graduate level many generally study in Western countries and with Western scholars, in the context of Western perceptions and ideologies. This then has tended to be the foundation for their approach. However recent studies reveal that Third World scholars are developing their own legal scholarship which actively engages with the construction of the customary in rural women's lives (Stewart 1995).

2.1.1 Analytical presuppositions of Third world women

Mohanty(1988) examines three presuppositions of Third World women inherent in western feminist discourse.

(a) Context of analysis

Within this women are assumed to be an already constituted and coherent group with identical interests and desires, regardless of class, ethnic or racial location, which implies a notion of gender or sexual difference or patriarchy which can be applied universally or cross culturally.

(b) Methodological level

Mohanty (1988) criticises the uncritical way proof of universality and cross-cultural validity are provided. For example, concepts like reproduction, the sexual division of labour, the family, property relations, marriage, household and patriarchy are often used without their specification in *local cultural* and *historical* contexts. These concepts are used by feminists in providing explanations for women's subordination, apparently assuming their universal applicability.

(c) Political level

Underlying the methodologies and the analytical strategies are the model of power and struggle they imply and suggest. For example the "status" or position of women is assumed

to be self-evident because women as an already constituted group are placed within religious, economic, familial and legal structures, with a common struggle against a common aggressor, regardless of class or ethnicity. This structures the society in a way in which women are generally seen as in opposition to men the aggressor and oppressor, patriarchy as always necessarily male dominance and the religious, legal, economic and familial systems implicitly assumed to be constructed by men.

Mohanty (1988) argues that the above forms of analysis have tended to construct Third World women as a homogenous powerless group and implicit *victims* of particular cultural and socio-economic systems. This has been achieved primarily through defining them in terms of their *object status*, that is, *the way in which they are subordinated or not by the systems under which they live*. She argues that Third World women need to be defined by what one might call their *subject status*, that is the impact of their role in political, economic and social development within their particular local cultural and socio-economic systems. There is a need to look at the activities they engage in within these systems. The gist of the argument is that Third world women should not be seen merely as *victims* but as *actors* within their local context. This would give a balanced view of women and the systems with which they interact.

Speaking of African women, Mbilinyi (1992:35) observed that ;

"women in Africa are and have been different contrary to neo-colonial efforts to homogenise them ; some are oppressed others are oppressors, each has her own individual psychology and personality, and draws on different cultural foundations and support systems, each has her own identities/positions."

"women have not been passive victims, strategies of accommodation, resistance, and struggle have changed according to time and place, and vary for different women."

Images of women in Africa have shown them in liberation struggles in Mozambique, Algeria, in the new South Africa, as victims(with men) in political turmoil as in Rwanda and the Congo(Zaire), and as struggling to survive in natural disasters such as famine in Ethiopia

and the Sudan, to the 'market women' of the matriarchal society in Ghana who generally control their incomes. A study of women should therefore look at them as "subjects" rather than as merely "objects" of analysis.

2.1.2 Local specific

In Africa, the arguments raised in the above discussions are being developed further by individuals and groups of women scholars in their research methodologies and analysis. They have also been joined in group researches by male scholars because the problems, although affecting women more than men, are seen as gender based discrepancies and differentials and consequently need a solution that requires the mobilization of both men and women (Okeyo:1989). The focus of the researchers is the development of an African perspective. Okeyo (1989:7) observed in her discussion on the theory and method in the study of women in Africa that ;

"These issues go to the root of *women defining their own images* and the potential for change in Africa. There is a need to elaborate an African perspective and approach on gender relationships and its implications for change."(*emphasis mine*)

To Okeyo the approach should be 'local' and with a cultural base. She pointed out that;

"Even though there is a universal and strategic issue of female subordination, strategies and proposals for change must be locale-specific. We need to understand the political, social and economic structures and ideologies within local societies and within countries to be able to pinpoint where and when sexual differences amount to discrimination and what can be done..... Thus there is the crucial question of the cultural base of each society and its gender relations."(1989:10)

She therefore argues that "Feminism as a social movement in Africa should be located within the African cultural base upon which it is to survive". She adds "Feminism in Africa cannot survive as a social movement with a theoretical and ideological foundation but no cultural base."(1989: 10). Ideological practices and rules within culture are generally so deeply rooted in society that they carry over into existing structures and influence any emerging ideology or movement such as feminism. Okeyo also argues that cultural notions carry over into research and researchers should be aware of them as these notions influence

theory and methodology and therefore the findings. Realistic solutions can therefore only be offered on the basis of the findings. In other words, the solutions should be 'locale-specific' if they are to be embraced by the 'locality' or the 'base.'

2.1.3 Methodology from the south.

More recently, groups of scholars (Ncube, Stewart, Armstrong:1995, Donzwa, Degu-Zvogbo:1994, Okumu-Wengi:1995) have carried this debate further in their researches on issues affecting women within family relationships. Their research adopts a 'Women's Law' theoretical and methodological perspective (WLSA:1994). This discipline was originally developed and articulated in Scandinavian Countries. It takes women's lived experiences as the starting point of analysis, what Tove Stang Dahl (1988) refers to as "the perspective of one looking upwards from below" in an attempt "to see both law, reality and morality from women's point of view." By examining the biological, social and cultural differences of men and women from that stand point, it helps to establish the actual differing impacts of law on men and women, rather than assuming that because there are changes to the law which for example grant equality under the law, the equality has actually been achieved. Another important aspect of the women's law approach is the value they attach to the use of the researcher's experience in the research thus denying neutrality. This is discussed further under Epistemological methodology.

In line with the above approaches two projects, one in East Africa, WLEA (Women and Law in Eastern Africa) and the other in Southern Africa, WLSA (Women and Law in Southern Africa) were initiated to tackle family relations within the context of their Regions. It had become apparent throughout these regions that inheritance was an area where the experiences of women revealed that they, unlike widowers and children of the deceased were up against societal values that seemed to subordinate them in entirety. However it was also clear that there were also other dimensions to the problem. Within

their experiences were socio-economic factors, cultural practices and attitudes within the informal, and structures and procedures within the formal in which these practices occurred. The researchers therefore sought for ways to combine a social science investigation and legal analysis which would give an holistic picture of the social, economic, cultural and legal setting in which inheritance takes place (WLSA:1994). This would also give a broader and more holistic insight into women's problems, experiences and position in relation to inheritance in their societies. This approach was found to be suitable to our research which locates women's experiences within the historical, socio-economic, cultural and legal context not only within the wider experience of Uganda but of the particular tribe, the Baganda, under investigation.

Adopting the above approach Armstrong 1995:11(WLSA) stressed the need for approaches and theories from the Third World to find solutions for the Third World. She observed that ;

"Northern (*Western*) ideas, approaches and theories have been used to 'develop' the South (*Third World*). It is time for the South to also educate the North. The North must pay attention to the values and perspectives of the South and the South also has a responsibility to provide and discuss information and ideas. One important ingredient of this is research. We have arrived at the stage where researchers from the South should be providing the information, theories and perspectives that determine development priorities. Researchers in the South must however, be aware of their own limitations- their own education has been largely controlled by the North. Even questions such as what kind of information is valuable and what is not have been by Northern perspectives."

Armstrong (1995:11) goes on to illustrate this 'Northern' perspective in the attitudes of researchers or scholars in the 'South' towards the "educated" and "uneducated."

"Those with formal education are 'educated' and those without 'are not educated.' This is the perspective that most women and law projects take when they set out to 'educate' women about law. The assumption is that because those with formal education know the formal law they 'educate' women. WLSA is learning that these 'uneducated' women know more about the 'law' - the customary law and the customs and practices than the 'educated.' Quite often we are the ones being educated."

Armstrong therefore argues for 'a socio-legal scholarship' in re-evaluating the concept and priorities of development for women as promoted by the 'North' in the 'South' over the

last several decades. These 'Northern' development strategies "implicitly see 'development' for women as involving the rule of law, education and equality,"(1995:8). This is a very 'formal' approach which leans towards formal structures and institutions and does not take cognisance of the 'informal.' Consequently Armstrong (1995:10) argues that ;

"...when we are talking about women and development, we must focus not just on written (common and customary) law, but on customs and practices (the norms and practices of people today) as well. The customs and practices are not based on rules, formal statutes and technicalities, but on *values* (informal). Thus, we are talking not about the rule of law but *the rule of values*." (*emphasis mine*).

In the field of law at the informal level, this in practice would mean incorporating into development priorities, the values and concerns of women *as determined by them*. At the formal level it would mean policy makers taking affirmative action and placing able women in positions of power in parliament, the legislatures or courts and so on as in the experience of Uganda described in Chapter 1. The participation of women in the Constitution making in Uganda is an example where at the informal level, women voiced their concerns stating their values and putting forward their ideas which were incorporated into the Constitution. This was combined with the formal where a woman from every district was elected to parliament. However these actions alone would be less effective without creating "an environment where different kinds of women, women of different backgrounds and with different relationships, are treated justly and have access to justice (Armstrong 1995:11)." According to WLSA their methodology recognised women as authorities through incorporating their experiences, values and perceptions.

2.1.4 Determining the values of women

A major task within the WLSA and WLEA projects has been the determination of these values, and ensuring that *they are values that support female interests* or are indeed female values within the Family and the Community (Armstrong:1995:11). Okeyo (1989) stressed

the importance of women's *self images* in determining these values which consequently affect their own development. She said;

"..Women should be seen not simply instrumentally, as mothers, house wives or producers, but as their own conscious beings. Women have *self images* and their *own aspirations and concepts* of how society should be organized and its resources managed."(*emphasis mine*)

This 'self image' or self perception as observed in Chapter 1 and analysed throughout this thesis influences her ability to assert her rights and the degree to which she can control her circumstances at widowhood.

2.1.5 Women's lives as expressions of meaningful projects of coping.

The need to develop an 'appropriate scholarship' for the context is also evidenced in the work of individual women scholars in Muslim Africa who struggle with the Western view of "women behind the veil". Lazreg (1994:1) for example, discovered that both Western and Western trained scholars represented Arab women "as passive pawns, trapped in a world dominated by hopelessly out dated and retrogressive religious traditions." She called for a new approach that recognises differences and accepts the need to explore the concrete, historical realities of women in different cultures. To ensure that the 'differences' do not become mere divisions Lazreg (1994:2) urges indigenous scholars to work towards "an epistemological break with the prevailing paradigm while also re-evaluating the structure of gender relations in their own societies." In writing her book "The Eloquence of Silence: Algerian women in Question": (1994), she says at pg.1-2 ;

"I decided to write a book that would avoid the assumption of an "oppressed" or "passive" subject and that tries instead to examine the interface between historical events and structures such as wars, economic, legal and educational policies, women and men.....The book seeks to convey the complexity of women's lives which so far has been flattened out by the assumption of unmitigated powerlessness. For example in urban centres one may see a policewoman helping a veiled woman cross the street.....The Judge on a case involving a female suit brought against a state owned-business company is a woman. A young woman sues her father for appropriating an apartment that belongs to her. Examples such as these are as common as examples that illustrate women's vulnerabilities. Both must be accounted for. Herein lies the challenge of studying Algerian women. It will not do to dismiss what is positive as exceptional or class-bound, and uphold the negative as normative and reflective of a flawed culture."

In her theoretical/methodological approach she avoids the general assumption of culture as being oppressive to women. She approaches women's lives "*as expressions of meaningful projects of coping* and transcending personal and social vicissitudes" and their "*activities*, no matter how mundane, *as purposive*, thus cautioning against their traditional dismissal as signs of powerlessness." (Lazreg 1994:2)

The contradictions and complexities of women as a group and yet as individuals, living within specific local cultural contexts calls for the 'unveiling' of their individual experiences and 'uncovering' of their voices.

This thesis seeks to discover the values that women see and want to be seen as supporting their interests in the 'informal' that is within family relationships especially at marriage and widowhood. It explores the activities they take to cope with what they see as a denial of their values and what factors are in place to assist them enforce their values, as individual women. In doing so the study adopts the position that *women's lives are different expressions of meaningful ways of coping according to their perceptions of their lived realities*.

There is therefore need to know and understand what women know, what they are doing about what they know, and what they would like to be done about what they know and which are expressed through their values. This would then be the foundation for any political, social and legal action to improve their lives.

2.1.6 Epistemological methodology

Experience as a source of data.

According to a group of critical feminists, experience can be a useful source for generating knowledge (Harding 1987, Mbilinyi:1992, McFadden 1992). They observe that women and men's lives are experienced differently because they live in differently structured lives, arising from the intersection between gender, class, imperial and race-

ethnic and other relations. "The interrelationships among and between these major social relations are complex, unstable, sometimes contradictory (Mbilinyi, 1992:50)." While there have been assumptions that the male is the oppressor (Mohanty: 1988), the distinction between who is the oppressor or the oppressed within these interrelations changes, depending on where one positions oneself in an active sense. It also means contextualising the issues in a specific location through examining concrete social relations. According to Mbilinyi (1992), critical feminist analysis draws out class relations among women within the same or different ethnic and national locations through positionality, that is the oppressed's stand point to provide a correct understanding of the world from that stand point. This necessarily means analysing the experience of the subject(s) under study as well as the researcher(s). Mbilinyi (1992) points out that experience cannot be taken for granted because our perceptions and interpretations of experience are problematic in that they carry with it our bias. It is mainly for this reason that it is criticised by traditional epistemologists.

Traditional epistemologies use scientific methodologies whose primary objective is to "produce neutral, objective knowledge about the world situated 'out there'. The researcher tries to remain outside the world under study, so as not to bias the findings (Mbilinyi 1992:52-53). Critical feminist epistemologists however argue that generally all observations, all knowledge is governed by the positions of the researchers therefore does have some bias and consequently does not produce any one truth but partial truth. (Harding: 1987). According to Mbilinyi (1992:53) ;

"Critical feminist epistemologies deny the possibility of neutral value-free science and knowledge. The researchers are part of the world under study. Our conception of the world under study, our construction of research instruments, our interpretation of data, are all affected by our multiple identities and discourses. The theories, methodologies and epistemologies adopted interact with our experience (empirical findings) in the world."

She argues that we need to theorise these experiences, deconstruct our interpretation of personal and collective experiences and in so doing will have the potential to generate knowledge within the limits of the value premises of the circumstances.

The Women's law approach sees the researchers as partisan to the problems under study and solutions being sought. The researchers do not distance themselves and therefore in that respect do not claim neutrality. They use;

"their experience as a resource to generate scientific problems, hypotheses, and evidence, to design research for women, and to place the researcher in the same critical plane as the subject researched (Harding 1987: 181)."

Dengu-Zvogbo et al (1994:13) writing about their research methodology on 'Inheritance in Zimbabwe' project found that they had to grapple with these issues. They acknowledged from the onset that their research would have a gender bias. This was inevitable as they were concerned with improving the lot of women. She said;

"It is our view that the decision on the subject matter for research is of necessity a manifestation of values and principles held by the researcher(s), thereby dispelling the value-neutral or value free notion of research. For example, the decision to research into inheritance issues as they affect women was based on our concern for widows and their dependants, and influenced by media and other reports on the hardships faced by widows in southern Africa."

In thinking through the objectives of their research, WLSA researchers found themselves faced with a number of issues that would inevitably influence their research methodology. The objectives reflected what they saw as a distinction between the women they were researching about and on whose behalf they were doing legal action, and the woman who was the researcher or the one doing legal action. According to WLSA, it reflected a "*Them / us*" stance. However they were also faced with certain truths in their lived realities as researches,

"But most WLSA researchers are also women, some are widows. Most of us are mothers and sisters and potential or actual actors in a situation related to inheritance. Therefore it is necessary, not just to ask what we want for them but also what we want for us, for ourselves. This has made us think about what we have in common with the women we are researching about as well as what differences there are between women. It has made us search for a variety of solutions to fit a variety of women in different situations and positions."(Armstrong:1995:9-10)

For WLSA researchers this has meant placing themselves in '*the same critical plane*' as the women studied especially as some of their experiences and identities were similar although as individuals they were different persons. They were aware that this would inevitably open the research to criticisms from traditionalist epistemologies that the research and its findings would be biased. Reflecting on the problem of bias in research' Mbilinyi (1995:56) argues that;

"Rather than dismiss the question as a non-problem or as unreasonable, we could turn to ideas such as those of Myrdal (1969). While accepting that value judgements exist in all of us and we can never be "value-free", he argued that we can increase our awareness of value premises and judgements. By bringing them into the terrain of the research of process, the researcher can try to control their influence, and by informing readers, allow them to judge their impact for themselves."

Example of this can also be seen in the work of Caplan (1988) who positions herself within her research as well as in her presentation and opens herself to the criticisms about the bias in the identity issues. Anthropologists coined the word '*self-reflexivity*' for inserting themselves as researchers into the terrain of the research, not only in the planning stage (the research proposal) or in the chapter on research design, but in the 'findings and overall analysis as well (Mbilinyi 1992:35)'. Harding argues that whatever the criticism from the traditionalists standpoint, women, "no matter what their race, class, or culture should not give up the desire to 'know' and understand the world *from the stand point of their experiences* for the first time(1987:189)."

2.1.7 Personal experience

I was confronted with and explored issues of 'similar experience as the researched' as reflected in Chapter one and consequently inserted myself as the researcher into the text at the methodological level but without bringing myself into the analysis. I raised the question of the degree of 'value-free judgement' as a result of my experience of 'widowhood' which happened so soon before the research began. This is discussed further in Chapter 3 on the

methodology. As a lawyer and a former (Stipendiary) Magistrate, I had advised women some of whom were personal friends and also presided over cases of widows. In chapters 8 and 9, the research examines the use of the legal process by a widow. I could not in those circumstances disregard my experiences as a Magistrate. This is explained further in the introductions to Chapter 8 and 9.

2.1.8 Multiple Identities

The WLSA researchers acknowledge that their research process is also influenced by their multiple identities as widows, mothers, sisters and so on depending on each individual woman. Consequently their construction of the research instruments and interpretation of data are influenced by their own experiences of these identities. The importance of these identities lies in the way a woman may manipulate them to achieve a desired end. Writing about this, Maboreke (1996:60) reveals in her study that ;

"In situations of competing articulations of identities, the assertion of any one identity necessarily eclipses an alternative identity. For example, asserting one's identity as widow of the deceased eclipses that of wife (of the living husband) because the status changes and so do the rights as prescribed by the cultural practices and ideology and ascribed to the two statuses. *Women exploit these multiple identities by highlighting certain identities and concomitantly attenuating others according to convenience and their respective purchasing power.*"(emphasis mine)

The study of Baganda women reflect how the change in their identities through stages of bride, wife, mother and widow affect their abilities to assert themselves within property relations and the extent to which they determine their lives. It also reveals how the rights of women within the stages in their identities are constructed and exploited by the systems in which they interact. In Chapters 8 and 9 the study pays particular attention to a woman using the legal process. It reveals how she exploits her competing identities of wife/mother/widow to win the sympathy of the court and achieve her desired outcome.

2.1.9 Property as a subject of Analysis : Anthropological perspective

The thesis uses property relationships in the giving of bridewealth, in marriage and inheritance to illuminate the perceptions that women have of themselves and the various regulatory systems within the relationships taking place. It adopts the position of nineteenth-century anthropologists whose main interests focused on property rights, marriage forms and the position of women. The importance of their work lies in the questions they raise about kinship, gender and economy (Moors:1991) which links the private with the public. In her critic of the work of Goody and Tambiah (1973), Moors: (1991) observes that in their discussion of marriage gifts and payments, they place the marriage payments within the wider context of the transfer of property and relate it to different productive systems and therefore to the economy and politics. Our thesis however narrows this discussion to the implications of these marriage payments (property) on gender relations especially in so far as they construct women and affect their ability to assert themselves within their family relationships. It links it to their use of structures or plural legal systems within the wider context of society.

The thesis therefore explores the analytical debates advanced by Whitehead (1984) and Strathern (1984) in their study of concepts of property in indigenous societies. According to Whitehead (1984:176) property can help us to understand the relations between people within a given society ;

‘property is not primarily a relation between people and things, but a relation between people and people - a social relation or a set of social relations.’

Whitehead (1984) was exploring the social character of property as reflected in the work of anthropologists whilst placing women and property as the central focus. She notes the significance of kinship in defining property relations and women’s capacities to act as

autonomous subjects in pre-state agrarian societies. Whitehead (1984) argues that in these societies what is actually taking place in the transmission of property through for example, ceremonial gifts of exchange or payment of bridewealth or access to land and other tangible resources, is an interplay of relationships embedded in local ideological and legal practices which in turn are located within family and kinship structures. These practices conceptualise men and women differently and with a differential power to act within property relationships. For example in bridewealth systems, women do not have the power to conduct marriage transactions as freely as men since a bride is 'transacted, and appears 'objectified' or conceptualised as 'property'. Associated with bridewealth is the institution of levirate in which a widow is 'taken on' or as is often referred to 'inherited' by the deceased husband's male kinsman usually his brother, in a sense as part of his estate and also appears 'objectified' or as 'property'. In these practices a woman's status as daughter or wife/widow weighs against her full rights in property. Consequently in kinship terms women are subordinate and defined as '*less than fully acting subjects*' in relation to people and property and men as '*full acting subjects*'. However, Whitehead (1984) stresses the need for culturally specific evaluations of the relationships and distinctions between the women even within the same cultural context because class or background among other factors may reveal contradictions in their abilities to act. Strathern (1984) also argues for the need to understand indigenous cultural equations between women and wealth and the nature of the transaction itself. She reveals the influence of ideological factors in constraining or fostering women's ability to act independently with regard to wealth/property and the contradictions that are revealed between ideology and practice when this approached is placed in relation to political, legal and economic forces.

The importance of the above approaches to this thesis lies in the fact that the investigation of property relationships takes us beyond the specific into more general issues of theoretical

interest in feminist studies. It links the domestic or household relationships to the wider social forces-political, legal and socio-economic. Property as an analytical category therefore remains one of the most favoured subjects in analysing society and it is its definition and dynamic nature which changes through time that makes its necessary to continuously interpret societal relations

The thesis explores the meaning of bridewealth transaction among the Baganda. It examines how women are conceptualised through bridewealth and the implications of this for their marriage relationships and widowhood status. It pays particular attention to women's perception of this cultural practice and the extent to which they are able to assert their rights as a consequence of the practice.

2.2.0 Social Fields as the 'context' of law

Choice of forum

It has already been noted in Chapter 1 that the attitudes and cultural practices of the community and the society thrust a widow into conflict situations irrespective of what the law might prescribe. WLSA researchers refer to the community and society as being regulated by various semi- autonomous fields. The life of members of the society which are lived within these semi-autonomous fields are informed and can be transformed by the impact of these fields. Speaking about the impact on widowhood, Doo Aphane et al (1995:27) reveal that ;

"Widowhood can become a very onerous and difficult status to bear. It is not merely a condition where someone has lost a husband and now has full independent legal status. Rather it becomes a situation where, *by the actions of the members of various semi-autonomous social fields*, a woman is thrust into new and often very problematic status.

Not only is this new social status which is in conflict with her actual legal status, the *product of the perception and actions of others but she herself maybe a source through her own self perception and acculturation of a socially degraded and seemingly powerless status.*" (emphasis mine)

Within the context of the WLSA project the semi-autonomous fields are described as ;

"normative forces within the community which regulate behaviour such as the family, the workplace, and religious or political organisations many of which also interact with the law at various levels..... They are recognizable by the capacity to generate and enforce norms. Thus in so far as it can control and mediate the behaviour of members, the family is a semi-autonomous social field, sometimes formalized into the family council." (Donzwa et al:1995: 76).

WLSA adopted Falk Moores' theory of the semi-autonomous social fields. Below the study explores the theories ascribed to these semi-autonomous social fields or regulatory mechanisms and the place of law within this.

2.2.1 Semi-autonomous social fields

The concept of semi-autonomous social fields is based on a body of thought that within society, there is no one rule making body (Pospisil:1971, Falk Moore:1970, 1978). That within a given observable field that internally generates rules and customs, there is the larger world which surrounds it and also exerts its own rules and influence. The importance of this argument lies in the status given to law as a main instrument of social change because of its monopoly on the legitimate use of force to induce compliance. This abstracts law from its social context setting it above all other forms of societal control with little attention given to the impact of the context on the law.

Falk Moore (1978) therefore sought in her analysis to find the place of law within society and culture. She was concerned with the shortsightedness of 'rule-makers' in taking law in isolation from other factors, as an instrument of social change. She observed that often legislation, judicial and administrative decisions are imposed on structures already existent in society to bring desired changes. She argues that there is a fallacy in this method because law is perceived as superior to all other structures and with the mechanism or capability of controlling them (1978:54-55). But law does not exist in isolation. It is within a social context which has characteristics of its own. The social context or social processes she labels '*the semi-autonomous social field*';

"which has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (1978:56)."

She therefore argues that the emphasis that is placed by scholars on the capacity of the modern state to threaten to use physical force through state apparatus (such as the law) should not blind us to the modes of inducing compliance by other agencies which may vary in form but not in effectiveness. She observes that ;

"between the body politic and the individual, there are interposed various smaller organised social fields to which the individual 'belongs'. These social fields have their own customs and rules and the means of coercion or inducing compliance (Falk Moore 1978:58)."

Rule makers should therefore be concerned about identifying these social process which determine the extent to which laws will or will not be effective in altering the context. Law like other social process does not have autonomy neither is it in isolation.

Falk Moore's assertion is confirmed in the findings of the WLSA research on widowhood. Themba et al (1995:108) found that the family as the basic unit in the organisation of society was ;

"the central, social and legal institution which shapes, defines and determines the rights and obligations of its members. In playing this function it often generates and enforces norms which are contrary to state law. *Its capacity for opting out of state law and control* suggests that it is an extremely resilient semi-autonomous social field."(*emphasis mine*)

Falk Moore was advocating for studies in the nature of the autonomy and the quality of the self regulation of the semi-autonomous fields because it could yield valuable information about the process of social life in '*complex societies*'. She observed that all the nation-states of the world, new and old, are complex societies when it comes to analysing the problems of fields of autonomy.

Dwyer(1982:517), in her discussion about weighing women's disabilities under the law, also reinforces Falk Moore's concept when she refers to law as not only being the sole regulatory force that subordinates women. She argues that for example, everyday aspects of life like "religion, gossip, the threat of scandal and the subtler reinforcement

of socialisation" are also part of the '*social control forces*' that regulate society. These social forces impact on the law and determine its efficacy or limitations. She takes the example of property control within family relations and elaborates on how legal and extra legal control forces distribute/share their regulatory impacts in this area. She argues that in this area, the legal articulation and differentiation of male versus female rights, duties and privileges are in most part determined by cultural practices, that is, by the extra legal forces, in spite of what may be prescribed by law. This means that where law may give a woman certain rights in property these rights may be denied her by the cultural practices of her community which may not permit a woman to have those particular rights. It is the same argument advanced by Themba et al (1995:108) and Donza et al (1995:76), that the social fields outside the law to a large extent control and determine behaviour in the communities they studied. Our thesis reveals the strength of the family in the regulation of bridewealth by customs and the insistence by the family council/ clan that it is the fulfilment of the custom that determines the legality of marriage in their communities in spite of what the law may prescribe. It also reveals some areas of family practice that enjoy autonomy apart from the law as in the choosing of an heir. There are also areas where the law enjoys autonomy as in the granting of Letters of administration to the deceased's estate but in the actual implication shares the administration with the various social control forces that are at grassroots such as the clan. The thesis also illustrates in Chapters 8 and 9 the struggle between the clan and a widow to enforce its cultural norms on the widow who sought to opt out of the custom of her community and to have her inheritance rights regulated by the law. What emerges are the competing activities of multifarious social fields and the impact on the parties involved. Griffiths (1986) develops this arguments further.

2.2.2 Legal Pluralism

Griffiths (1986:36) observes that the strength of Falk Moore's (1978) analysis for a descriptive theory of legal pluralism lies in her appreciation ;

"of the complexity of the social situation in which law finds its working, in the freedom of her approach from hierarchical, centralist, whole-society preconceptions, and in her emphasis on the continuously variable autonomy of 'social fields.' Also important is her emphasis on the *dynamic aspect of partial autonomy*, that is, the tendency of a self-regulating social field "to fight any encroachment on autonomy previously enjoyed"(1978:80)

He however criticises Falk Moore's theory of the 'living law' in that she approaches legal pluralism primarily from the perspective of state law, that is, the effectiveness of the law of the state within a 'social field'. Her emphasis is primarily on legislation within a semi-autonomous social field which is a concern with relations between the state and non-state and according to Griffiths, paid little attention to the relation between non-state semi-autonomous social fields. Griffiths (1986:2) was concerned with developing a *conception of legal pluralism suitable for the variations in social fields, some of which are more pluralistic than others*. In that respect he argues that :

"A situation of legal pluralism - the omnipresent, normal situation in human society - is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the *self-regulatory activities of all the multifarious social fields present and the activities may support, compliment, ignore or frustrate one another*, so that the (living) 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice *unpredictable patterns of competition, interaction, negotiation, isolationism, and the like*."(italics mine).

Santos (1992) in his critique of legal pluralism was keen to develop a theory of legal pluralism wide enough to account for the variation in its manifestations across the world system in the context of the social, political and political processes in which they occur and so contribute to the debate on the democratisation process in the 1990s. While our thesis is concerned with the debate on a narrower framework and specifically within the ordering of family relationships within the State and impact on

women, we adopt here some of his arguments. The State is a contested terrain, a social field in which a plurality of legal orders both state and non state exist in the same political space and "interact, merge, and conflict in dynamic and even volatile combinations"(1992:132). The significance of this lies in *the historical process* in which these social relations or transformation occur. To Santos (1992:140) they represent "*a transitional moment*" in the historical process of state construction or transformation. Consequently *they are marked by a recent past and are a part of a process of rupture or continuity with a previous state form*. One example of this can be seen in popular justice systems where a new 'form of justice emerges "that purports to break with both the colonial and traditional customary law" as in the case of Mozambique and Uganda (see Chapter 4). In reality however there is a continuity either with the existing judicial structure or customary law which is generally deeply rooted in society.

Within these various definitions and explanations of a state of 'legal pluralism' the thesis explores the interactions that take place within family relationships in marriage transactions, the marriage relationship and especially at death. It examines the role of both state and non state legal orders or social fields, that is the forums for dispute settlement, the customs and practices, beliefs, structures, political ideologies and the like in the regulation of the relationships. The thesis reveals the interactions in the relationships between the social fields and the impact on the society especially women. An important aspect of this analysis is the historical process in which these relations occur and the elements of continuity with the past.

2.2.3 Choice processes in the 'social fields'

The thesis explores factors that determine choices and the strategies that are employed by the multitude of actors, especially widows, at inheritance. Within the context of the WLSA research project Donzwa et al (1995:77) found that ;

"to fully understand the choice processes in a plural legal system one has to appreciate that they operate in a plural society and that some of the choices may be such that they are deliberately intended to exclude the operation of one system of law or that the parties, if they had had a choice would have excluded the operation of a particular system of law"

Consequently choosing to be regulated by the customs and practices as administered within a tribal community and the family would mean the exclusion of the formal legal and administrative systems. It is the presence of these varying options of both process and form that WLSA found formed part of the choice framework for individuals to pursue a chosen course of action and also determined the regulatory regimes to use in doing so. This depends on the availability and the knowledge of the choices available. Within the WLSA and WLEA project it was found that parties were sometimes ignorant of the choices on the ground and therefore exercised the only option they saw as available. The majority of persons at grassroots were generally only aware of the rules that governed their communities. In situations where the State took steps to introduce other measures at grassroots as for example the RC system in Uganda or where there was dissemination of information to grassroots, the choice options created unpredictable outcomes.

This thesis explores the options available to the women researched. It examines how individual widows *actively* maximize their options in dispute settlement. It also explores how a widow's self perception and her perception of the range of practical options open to her determine the extent to which she was prepared to assert herself.

WLSA found that, for example if the family of the deceased decide that the widow be left in charge of his property then she will not pursue the general law. However if the family is 'grabbing' property, then she might opt to use the general law or other regulatory regimes outside the family structure to achieve her aim.

The way in which the law as applied by the courts and related administrative structures is affected by the interactions between the regulatory regimes, is reflected in the influence and attitudes of their key officials. WLSA found that where the administrators and judicial officers explore the possibilities and do not passively rely on the submissions put before them, the choice of law can be optimised for the benefit of interested parties in the estate. The thesis explores how the decision of the judicial officer in Nabakooza's case sought to bring the competing regulatory regimes to a compromise for the benefit of all the parties involved. The case also reveals the efficacy and the limitations of the law within these various social fields.

CHAPTER 3

RESEARCH METHODOLOGY

3.0 Introduction

The examples in Chapter 1 reflect the ways a range of women confront inheritance issues in pursuit of their individual needs. It reflects the choice options they made within or outside the formal law. The examples raised questions on the degree to which their self perceptions determine their choice of action and the availability of the choice options on their ability to determine their fate. Through this, the chapter sets the argument for a different way of perceiving women as individuals whose lives should be seen as meaningful ways of coping as evidenced in the different strategies they use to achieve their interests rather than seeing them as 'passive victims' of their circumstances.

Chapter 2 develops the arguments further and explores debates especially by Third World Women scholars on the methodological and analytical approach to be applied in determining self perceptions of women which in essence reflect their values. Their scholarship argues for a perspective that takes women as "knowers" by exploring their experiences or lived realities to generate 'scientific' knowledge. It calls for an understanding of the historical and the local cultural context in which they live and which construct their lives and determine their choice options. The debates around this show the context as being plural and as being regulated by plural regulatory regimes. The debates therefore argue for legal research and legal scholarship where 'law' is not subsumable under one system but under plural regulatory regimes. It is within this perspective that the interactions between the formal and informal can be understood and reveals the nature of the 'living law' effective on the ground. The research reveals that women use these variety of regulatory regimes to maximise their options.

This chapter therefore discusses the research methods used to gather information from various sources that reflect women's self perception as mediated by the regulatory regimes within their socio-cultural context, and also the nature of these regimes.

A number of issues arise from the methodology. Firstly, the general difficulties over the gap in research due to missing data as a result of the political history of Uganda and the impact of this on current research. Secondly, the debate about the degree of objectivity and subjectivity in research where the researcher has had a similar experience as the researched and the impact of this on methodology. Lastly, how this debate fits in with the epistemological debates in chapter 2.

3.1 Missing Gap

A major problem that confronted the research was the lack of data. Uganda went through over fifteen years of political upheavals from the early 1970s to late 1980s. This led to rapid economic and social decline with a crippling effect on the infrastructure of the country especially in health and education sectors, (National Population Policy 1995). In terms of academic life, in research, publication and documentation, the effect has been devastating. There is a missing gap of over fifteen years. In government departments there has been no or poor documentation. Some documents were looted or destroyed during the military coups that took place. Within Makerere University, the main university in the country, publication came to a standstill and research minimised. A major problem was the lack of funding. Most researchers are generally funded by foreign funding agencies. Commenting on this, Kisamba-Mugerwa (1989:78) said ;

"there is the problem of political instability such as characterizing Uganda for the last decade. Obviously no foreign agency would like to invest its money where chances of receiving results are minimal."

Several academicians also fled the country or emigrated. Some were killed, especially in the 1970s during the regime of the military dictator Idi Amin who was toppled in 1979. Amin's target was primarily tribal but it soon spread to the academic and professional elite in the country. Subsequent military coups in the 1980s continued the instability making it uncondusive for those who had fled to return. In 1986 the current Government came into power also through a military coup. As discussed in Chapter One, in 1987 it embarked on an Economic Recovery Program for economic stabilisation and structural reform and gradual economic growth (National Population Report 1995). This has stimulated growth in other areas such as education especially with a new impetus for research at higher institutions of learning. Facilities for publication are still greatly lacking therefore much research remains unpublished. At postgraduate, especially doctoral level, most students have generally studied abroad. Consequently there are more materials about Uganda scattered in academic institutions abroad than in the country. Availability of secondary sources for this research was therefore hampered by these factors. Writing about "Research Methods, Priorities and Support Needs on Women in Development in Uganda" Kisamba-Mugerwa (1989:76-78) commented;

"Obviously any researcher is guided by past research and in many cases tries to fill up the gaps which were left by previous studies.....Generally there is little literature on Uganda women. Consequently, the baseline statistics on women's participation in development in Uganda are almost non-existent. This places the researcher in a very difficult position to document his/her research ... This means that the real needs of Ugandan women remain unaddressed by such researchers."

Tadria (1989), speaking on the same issue, went on to elaborate on the areas that needed research on women in Uganda. She noted that ;

"-Specific categories of women that need special attention as research priority are widows, single women, heads of households and urban migrants. The present economic conditions in Uganda must present special problems to these women in a country where male headed households have traditionally been identified for mainstream development programmes. Even the overall percentage of widows and single women heads of house hold is not statistically

established in Uganda."(NB since the 1991 Population census statistics are available on female headed households (See Appendix 3.8)

At the time I started my research there were two major researches being conducted in the country on inheritance with specific focus on widows. One by Government, the Ministry of Women in Development (WID) and the other by WLEA (Woman and Law in East Africa). They were however in their virgin stages and their findings still not analysed. Consequently research materials were generally not yet fully developed as in the WLSA project which were done in several countries in Southern Africa that had known stability for several years. This explains the frequent reference in chapter 2 to the research methodology developed in Southern Africa.

3.1.1 Location of researcher within research

As illustrated in Chapter 1, I found myself going through the experience of a widow at the death of my former husband, before I began the research. Certain issues, some pointed out in Chapter 1, were inevitably highlighted in the methodological principles as I began the research. One was whether a researcher can be '*detached, objective and value neutral*' (Reinharz 1992:263). I agree with Reinharz that 'subjectivity and objectivity should be seen as "serving each other," even at the risk of being accused of "biased scholarship" or "over identification" with the persons being researched. I consider this as inevitable especially where the subject of the research has touched the researcher's personal life before or during the research as with the unexpected turn of events in my case. The important principle to bear in mind, as observed by Reinharz (1992:262), is to be able to differentiate one's own experience from the experience of the subjects under study. She gives the example of O'Leary (1977) who in her book 'Toward understanding Women' admits that her perspective as a feminist social

psychologist and as a woman guided her understanding and interpretation of psychological literature. O'Leary argues that ;

"Recognizing that she has a perspective does not mean that she then abandons what she considers to be objectivity. On the contrary she believes that she can present material objectively while guided by an explicit perspective"

As already pointed out in Chapter 2, within African legal scholarship, scholars argue that the *personal location of the researcher* is vital to the whole process including the production of the knowledge ;

"Decisions about what problem to study and which methods to employ, arise not only from adopted theoretical frameworks but also in the ideology, personal identity and 'material' social location of the researcher. Researchers have become increasingly self-conscious about their location in the research process and the social relations within which they produce knowledge (Mbilinyi:1992:35)"

Consequently the female scholars in the WLSA and WLEA projects *made conscious decisions about their research process*. They took cognisance of their personal 'identities', as women, mothers, sisters, widows, potential or actual actors as the women being researched and the implications of this for both them and the women researched.

3.1.2 My personal location

I found it necessary to insert myself at the methodological level because of my experience of 'widowhood'. The issues that were raised as result of the experience gave me new insights into inheritances practices. Before my experience, information given by widows I had come into contact with was generally negative and coloured my perception of inheritance practices. My interviews therefore sought to elicit information about each woman's individual circumstances and experience, while paying particular attention to the roles of the decision makers and their perceptions of the issues and the perception and response of the widow to her circumstances. In this way I could get a more balanced view of the practices.

In the 'location' of my 'identity,' I was once a woman who was married and the man had died. I had experienced grief and was confronted with issues surrounding widowhood as described in Chapter 1. Although I never at any one time during the data collection gave any details of my experience, my revelation of my marital status encouraged the widows interviewed to immediately 'identify' with me and 'pour out their hearts.' Self disclosure as a method generally stimulates respondents especially where there are similarities in experience (Reinharz,1992:263). The widows interviewed also expressed gratitude for what they interpreted as my interest in and concern for their state, something they saw as missing in other researches which had been done in their location. I found this embarrassing as I had perceived it as an exploratory study and also an academic pursuit. I took time to explain the purpose of my visit to them. Time and again different women expressed their gratitude. It appeared they needed to voice their concerns. I was also a 'lawyer' which put my 'material social location' in a different sphere especially from the widows in the rural area, none of whom were professionals. Their reactions in the respect given me and their request for 'legal' advice which I felt compelled to give, indicated that they saw me as a privileged person. Their immediate response to my 'identity' as a lawyer was that I could 'help' especially where a widow had some unresolved conflict. Responsibility for the consequences of the research, for example taking the role as counsellor to respondents can become part of the research and also stimulate respondents (Reinharz:1992). These various factors influenced the research process, especially in encouraging 'openness' and therefore making the eliciting of information easier. Within the urban location there were some interviewees with considerable assets but my status as a lawyer put me in a different category.

Lastly I went into the field to treat my respondents as subjects and not objects. There was room for empathy which was inevitable especially in homes where there were orphans or a widow with visible signs of HIV/AIDS infection and who was quite ill. The widows needed and appreciated the advice in the midst of their traumatised lives. In the analysis of the court case (chapter 8 and 9) I had my experience as a Magistrate four years earlier and therefore understood the short comings in the courts, the conflicts between the different regulatory regimes within family law and the problems in litigation at inheritance. I also knew some of the legal officers in the only courts that were in my research location. This, and my former status as a Magistrate made access to materials easier, some of which would not have been made readily available to an 'ordinary' researcher.

Chapter 6 on the cultural practice of the giving of bridewealth had also been part of my experience. During the cultural ceremony of the giving of bridewealth to my family, I, as a lawyer *sat quietly and in submission* to the negotiating parties (males only from both sides of the wedding party) during the ceremony, and did what was expected of a bride-to-be. After introducing the groom and male members of his family that had accompanied him, I was not permitted to utter a word therefore was unable to voice my frustrations with some aspects of the ceremony. This was followed a few weeks later by a western (Church) wedding where I took decisive and firm actions.

I was investigating bridewealth practices of another tribe where this ceremony was also very important. Although I do not insert myself in the findings or the overall analysis there is no doubt that these various factors had some direct or indirect influence on the research process. However I had deliberately selected an ethnic tribe, the Baganda (Bantu group) which was different from my ethnic group (Nilotic) and knew from experience through attending weddings of friends and funeral ceremonies

that there were differences in customary practices. I could therefore investigate more objectively to discover the practices of the Baganda. In the final analysis it was a research to reveal the voices of women and their self perceptions and to move away from the general assumption of a completely 'oppressed and passive' victim. The Baganda were an example.

Commenting on the methodology that Obbo (1974) used during her research on the struggle of Baganda women to adjust to change through rural-urban migration into the capital city, Kampala, Kisamba-Mugerwa (1989:74) said ;

"The method of gathering data was through participant observation. Being a woman and the fact that she could speak the local language stimulated more co-operation and therefore helped her to gather more useful information. The results of this study have helped in setting up plans for the participation of women in development in Uganda."(emphasis mine)

As 'a widow among widows' there was a meeting of the 'minds' with the widows in the field through the experiences. There was an understanding that although the experiences were of individual women with individual needs, there was a common need to voice them and also for a platform to publicise the findings and to work towards some solutions.

3.1.3 Objective of the study.

My interest in deciding to research on widowhood had been stimulated and greatly influenced by the picture painted of the widow at the death of her husband. The picture was of a totally helpless and victimised woman who did not have any say in the deceased husband's estate, who made no choices and who in almost all cases lost all the family property to the in-laws and occasionally to the children of the marriage too. The widows that sought assistance from FIDA Legal Aid Clinic and the few who pursued litigation in court painted this picture too. Neither the FIDA staff nor court officials are required to visit the locality where the cause of action arose, unless it is

deemed absolutely necessary in the circumstance of the case. The magnitude of their work and their limited resources makes it too time consuming and costly to do so. This can sometimes deny a decision maker a clearer picture of the situation. Before my personal experience of widowhood I had sought in my study to explore incidents of 'property grabbing' at inheritance. My perception then was that the solution to the problem was purely legal, that the laws of several African countries were discriminatory and offered little or no protection to women at inheritance. The seminars that we generally organised as women lawyers often concentrated on our received understandings of the problems which tended to emphasise only the negative side of the cultural institution. My experience of 'widowhood' had given me a different perspective. I became increasingly keen to discover what was happening in the lived reality of women's lives.

Very little research had been done on inheritance practices. As already pointed out, there were two major ongoing projects in the country. Some of their findings were availed to me at the time of my departure abroad to write my thesis. WLEA's main objective was ;

"To identify the substance of the laws, customs and/or the lack of either, in a gender context, so as to determine their impact, effectiveness and/or their discriminatory nature to women" (Okumu Wengi et al:1995:ii). The actual research reflects an emphasis on the discriminatory and oppressive nature of these laws and customs on women. The WID research also emphasised this. Their study was intended to explore 'the customs and practices relating to inheritance practices in Uganda.'

Our point of departure as already noted in Chapters 1 and 2, was *to consciously make women subjects of their lived realities by examining their coping strategies in what is*

perceived as a subordinating environment, and not to perceive them as objects of oppression.

The WLEA and WID projects however highlight important issues at inheritance which are summarised below. Practices vary between different tribes so what appears below are common points though practised in different ways. The research findings revealed that ;

- (a) Decision making in the choice of heir, distribution of property, guardianship of children and widow inheritance, is dominated by men with women hardly having a say.
- (b) Custom is often interpreted to suit the interests of the person making the interpretation. Consequently orphans and especially widows have often lost property to unscrupulous male relatives of the deceased.
- (c) As society changes there seems to be no uniform custom or customary practice anymore. Custom is not static and is open to different interpretations as well as mis-interpretation.
- (d) Statutory law is generally rarely applied. It lags behind custom, two decades after its inception. The main problems being related to its inaccessibility to the majority of the population who live in rural areas. The courts and offices that administer the deceased's estate are mainly in urban areas which often means long distances and expense for the majority of the rural population. The procedures are also foreign to indigenous practices. The majority of the people researched were also found to be ignorant of the written law.
- (e) There are more cases of women refusing to be inherited with some preferring to cohabit with men of their choice. Also women as individuals and in groups are seeking ways to counter the crises they face at widowhood through investing in income

generating activities. This indicates that women think about their problems and possible solutions to them.

(f) The RC structure was found to be the most accessible to persons at grassroots including women.

Most of these issues had been explored in my field research since they arise from the general practices and customs in inheritance.

The WLEA and WID researches and my research were greatly stimulated by the 'political climate' of the day. There was the constitutional making process in the country which was well publicised through the media and which filtered down to grassroots through the RC system. For women especially, this was seen as an opportunity to voice their concerns about issues that deeply affected their lives and to ensure that they were included in the new Constitution. Women were interested in legal issues concerning their relationships in the family with inheritance high on their agenda. This interest was also partly due to the high incidence of HIV/AIDS related deaths which left many widows. Women became more assertive and often voiced their concerns through the RCs or through women's groups. District female representatives in the Constitution Assembly worked effectively to disseminate information through net-working with women representatives in the different levels of RCs from District level to the villages at grassroots. The RC system proved an important and effective vehicle for mobilisation of people and for dissemination of information.

The women I was researching on were eager to know whether there would be positive changes in the law in so far as it affected women (and their children). Once again, I found I had to take responsibility for the consequences of my research Reinharz (1992) especially in the light of the confidence the respondents had in me as a lawyer.

3.1.4 Data Collection Strategy

(1) Themes

The interviews, discussions and documentary research followed the themes listed below;

- (a) Perceptions and attitudes to marriage and inheritance practices;
- (b) Women's perception of themselves in their relationships to people and property and their perceptions of the various regulatory regimes.
- (c) The strategies widows use to claim property and the claims they make.
- (d) The role of the regulatory regimes such as the clan, RC, DES, the AG and the courts at inheritance and their perceptions of each other and of widows claims to property.

(2) Research questions

Some basic questions guided the research process and incorporated the themes.

Marriage

- (a) How does the kwanjula/marriage ceremony construct a woman and what are women's perception of themselves as a result of this ceremony.

Inheritance

- (b) Who determines in practice the legal status of a marriage relationship or who a widow is.
- (c) To what extent are the relatives of the deceased able to control a widow's right or access to property at inheritance.
- (d) What is the impact of a widow's resource (material, level of education, support from relatives, friends) position on her ability to assert her rights.
- (e) To what extent was a widow able to assert her rights and what factors played a role.

(f) To what extent are the regulatory mechanisms enabling or constraining to the widow to assert her rights.

3.1.5 Procedure

Procedure used in data collection and research are discussed in the order in which they were done.

(1) Elements and methods of the Study

(a) Administrator General's office

The first element of the study was to examine the purpose and the extent of the use of the office of the Administrator General (AG), which is centrally located in Kampala city. The primary focus was to determine whether deceased males (husbands) leave wills that include females (wife/wives) as beneficiaries, whether a surviving wife makes claims for the deceased's property through the AG's Office and who the other applicants were. Secondly it was to determine whether there were reported cases of deceased females with property, whether they make wills and who the applicants were, for their property. Thirdly it was to determine which regulatory regimes were involved in the settlement of the deceased's property and what their roles were. This whole exercise involved the study of files and records in the AG's office.

Over 100 records, kept in individual files were selected for Masaka and Rakai, the two districts selected for indepth study on widowhood. Out of these, 75 were selected for study in detail for purposes of the research. The remaining 25 files had documents missing from them. Files were selected from January 1993 to July 1993. July was cut off month because at the time the research was began in October 1993, most of the files from August 1993 onwards were either still uncompleted and had scanty information or were not readily available.

The files contained very detailed facts and information about the deceased, such as, the cause of death, the tribe, age, marital status, religion, occupation, place of residence, names and ages of deceased's children, surviving spouse(s), the deceased assets, who was making claim to the deceased's estate, whether the claimant/applicant had a legal representative, whether the deceased left a will (some files had copies of the will). In addition any correspondence that had taken place between the AG and the DES, RCs and any other person or institution concerning claims, disputes and settlements made, were well documented. Some files had some information missing. This is partly due to files moving from hand to hand or one section of an office to another, and in the process documents get misplaced. Other files were being worked on.

The AG's office also had a back load of work because of the constant flow of clients to this centrally located office in Kampala and the few staff. The AG's office is composed of the AG, his deputy, one Principal State Attorney, and nine State Attorneys, as his assistants. The support staff include five clerks to record statements from the public, three officers in the filing registry, thirteen staff in the Accounts department, an office Superintendent, and four secretarial staff (WLEA: 1995).

I interviewed the AG, a State attorney in that department and two clerks who sort out the files and keep the records about the general role of the AG's office and the issues that come before them. Beneficiaries and applicants for the deceased estate generally flock to the office of the AG for settlement of the deceased's estate. During the days spent researching in the AG's office, there were often crowds of widows and their children, and other applicants seeking help. Many had travelled from all over the country. One could see that they were tired and because of the congestion there were often frustrating delays. Many had been referred to this office by the DES or the RCs of their home area, or by persons who knew about the AG's office. The civil service

and parastatal bodies also refer applicants especially in claims for the deceased's pension. Women's organisations like FIDA and ACFODE and the Ministry of Gender also refer cases that come to their attention. Meetings with families of the deceased are held daily. I attended one family meeting to observe the interaction between the family members, and between them and the State attorneys.

(b) Findings from the AG's office

The information gathered about estates of deceased persons, the use of the AG's office by applicants/beneficiaries gave insight into the running of the AG's office. This office settles disputes and takes court action on behalf of aggrieved beneficiaries especially where the property has been 'intermeddled' with by persons not entitled, or misused by persons entitled, to the detriment of other beneficiaries. The centrality of the office in Kampala meant that communication with the AG's representative at the district level was often delayed, sometimes for months, due to lack of financial resources, poor public communication facilities like telephones which are often not working, or the lack of transport for assistants of the AG to travel to the locus to determine what had happened. As a consequence, sometimes the assistants reach the locality when the property has already been mismanaged or is not recoverable. This is for example, in cases where there are domestic animals which may have been sold or consumed. Sometimes cases are shelved because of these short comings. However, the findings reveal that there is a great public awareness of this office because of Government's efforts to disseminate information that are tailored to giving women equal rights with men. Inheritance which widely affects women has been high on the political agenda. Consequently there is an increase in the number of reported cases as reflected in the WLEA findings shown for cases between 1990 and 1994. Their findings however do not reflect breakdown on who the applicants are.

No. of cases reported to AG between 1990 and 1994

<u>Year</u>	<u>No of cases Reported</u>
1990	1,153
1991	1,473
1992	2,117
1993	2,422
1994 (June, 30 th)	1,101

Source: WLEA 1995

I compiled the results from the 75 records and files in my research findings into charts, giving a breakdown of who the applicants are (see Appendix 3.1 and 3.2). The study of the records confirmed that the majority of the indigenous population do not make wills. Out of the 66 deceased males 21 died testate and 45 intestate (Appendix 3.1). In the case of deceased females recorded in the same years, 3 died testate and 6 intestate (Appendix 3.2). Inheritance is widely known to be culturally handled and these statistics confirm this. The records also show that very few widows make claims to the deceased's estate through the AG's office. Out of the 64 deceased married males only 10 widows made claims. It was therefore necessary to discover from field research what steps widows were taking about property settlement at the death of their spouses. The scarcity in the number of women whose death are reported to the AG's office was thought to reflect either that few women owned property or if they did, it was taken over by family members without recourse to the AG. This could imply some cultural practices relating to women and property. It is interesting to note that 7 out of the 9 women whose deaths were reported were single women with property. This could also imply that more single women have personal property than married women.

The records also show that although a few widows were found to have used the AG's office, deaths are reported to the AG by other beneficiaries to the deceased's estate. It was hoped to discover from field work why this was so. The records also show that the AG often takes over the administration of the deceased's estate for the benefit of the beneficiaries. 40 of the 66 cases of deceased males and 5 out of the 9 cases of deceased females were administered by the AG. The AG is empowered to administer estates of deceased persons by 'The Succession Act as amended by the Succession (amendment) 1972 Decree' Sections 179-207. The DES, his representative at district level generally has supervisory powers over the distribution of property at district level when he has received instruction from the AG's office. But the DES also has powers to order the distribution of property where the parties choose not to go to the AG's office or to court and especially where there is a dispute. The office of the DES which is in every district, is established by the Resistance Councils and Committees Statute, Statute 9 of 1987 (Part IV). The DES is also responsible for the activities of the Resistance Councils (RCs) in his district. The RC is a policy making organ and empowered to deal with problems at the grassroots (see Chapter 4). It is often the first forum that the local people go to for a solution. Generally matters touching inheritance go through the RC first then to the DES before reaching the AG's office. The AG's office therefore relies heavily on these offices at district and grassroot levels for relevant information and or implementation of its decisions. Many of the files and records contained correspondence between the AG's office, the office of the DES and RCs. Some of the correspondence revealed disagreements and conflicts between their areas of authority. Others revealed conflicts between them and the beneficiaries and especially the Clan which is a family council culturally empowered to handle the property of the deceased. It was therefore necessary in the field work to examine the

relationships between these forums, their roles at inheritance, their perceptions of widowhood and their interactions with widows and other beneficiaries.

The findings also reveal that the main properties reported were houses and cash, with houses featuring 56 times and cash 10 in the case of deceased males and 4(house and land) and 5 cash, in the case of deceased females. The large number in houses was a probable reflection of the properties that were generally left by the deceased. The research sought to determine whether there were other types of property considered for settlement.

An important and quite significant finding is the cause of death and the age groups most affected. Among the deceased males 25 died of HIV/AIDs and 41 of other causes, and among females 6 and 3 respectively. The figures (Appendix 3.1) show that the age group most affected is between 20-39, with more dying of HIV/AIDS (15) than of other causes (11), out of their total of 26. In the age bracket 40-89 only 10 died of HIV/AIDs and 30 of other causes out of their total of 40. The trend in these findings are reflected in our field research in Chapters 7 and 8. They are also reflected in Government's concern about the magnitude of this problem shown in the wider context of the country in Appendices 3.3 to 3.6 and discussed towards the end of this chapter. In terms of our research, this has policy implications for the administration of estates of deceased persons especially with many dying young and leaving probably young families whose future welfare have to be taken care of especially that of children. This is aggravated by the loss of both parents. It is also noticeable that the majority between the age bracket 20-49 died intestate 33, and 7 testate, out of their total number of 40, compared to the age bracket 50-89 where 14 died testate and 12 intestate out of their total of 26. The significance of this whole picture lies in policy

implications for encouraging the population especially the younger age group to make property settlement for their families.

(c) Law reports and unreported cases and judgements:

The second element of the study was to determine the extent to which widows use the courts, in settling disputes relating to the estate of the deceased and the types of claims they make. This information was gathered from law reports dating back to the 1940s. Some of these cases are quoted in the thesis where relevant. It is significant to note that there were very few reported cases in the Law reports where a widow had gone to court to claim the deceased's property. Interviews with judicial officers, lawyers and clerks in the subsequent field work appear to confirm that many cases are dealt with at family level within the clan and therefore outside court. The thesis has therefore concentrated on the actual findings in the interviews with widows to determine the current significance and use of the courts and /or other forums by widows. This also took account of the fact that the RC judicial system was introduced in 1988 and from the records in the AG's office appeared to be a new institution involved in dispute settlement at inheritance. The extent to which different institutions are used by the widows and why are reflected in Chapter 7 (Appendix 7.1.A and 7.1.B).

I selected one court case of a widow (Nabakooza) from a rural area for further study (see Chapters 8 and 9). The significance of the case lies in its illustration of the extent to which a widow can assert her rights within the choices options available. It also illustrates the interactions between the various forums/semi autonomous social fields in their struggles for autonomy or to coerce or enforce compliance on various parties at inheritance. More significantly, it reveals in Chapter 9 the absence of autonomy in the relationships between the law, the clan, the RCs in the actual administration of the deceased's estate.

Another case of a widow (Regina) in Masaka, which was still pending in Court, also a widow in dispute with an in-law over her deceased husband's estate was selected for follow up (Chapter 8 and 9). This was a case of an urban widow using the court process. Her experience could be contrasted with that of Nabakooza, the rural widow. Regina's case was started in 1992 and was up to the time I left the Country to return to UK in 1995 still unresolved. Some rulings had already been made concerning some assets of the deceased, but as in most cases, appeals and counter claims are made and so cases take time to resolve or are sometimes abandoned. However for the purposes of analysis, the material available served the primary purpose of examining the relationship between the regulatory regimes and the widow at inheritance, in the urban area. This case reveals the extent to which the urban environment provides an enabling environment for the regulatory regimes which in turn enables a widow to assert her rights.

Interviews with the Chief Magistrate and court clerks in Masaka raised questions about the extent to which the court system assists a widow, the obstacles she faces in the legal process and its perception of her.

(b) Baganda culture: focus group discussion using open ended questionnaire.

The third element of the study was to determine the Baganda culture as it affects women and their relationship to property from the time of the *kwanjula*/wedding ceremony through marriage to widowhood.

Rural and urban samples were selected from the field work to determine rural/urban differences if any in the perceptions, attitudes, and strategies adopted by women in their experiences. There was an assumption that there would be educated and professional and propertied women in the urban centre as opposed to the rural who were less educated and generally known to be poorer and that their experiences could

be different. Elders and opinion leaders in the communities studied and groups of women were interviewed about Baganda culture.

It was important that the area of study should be within the same ethnographic zone and in this case, Buganda to allow any differences of the experiences to be attributable to the features within the zone such as urban or rural rather than tribal, customary or cultural differences.

(d) Pilot study

A pilot study was conducted using an open ended/semi structured questionnaire to test the feasibility of the use of this research instrument in the field. Five Baganda women from Kampala city from various backgrounds, professions and experiences and who were either married, separated, divorced or widowed were interviewed. The questionnaire was designed to elicit information from Baganda women about the way they perceived their ownership, use, management, and control of property, before marriage, in marriage, at separation or divorce and finally at widowhood. It was also intended to discover the extent to which a woman's profession and resource assists her to control her life. What was envisaged was a guided interview while taking notes. It turned out to be a very lengthy exercise. The respondents had been purposefully selected from the University and a secondary school where they were working. They were professional women with busy schedules. Some preferred to answer the questionnaire in their own time, and others to simply tell their story. It was therefore decided that the questionnaire would be used in Kampala city only, as what was required was general information and that whoever wanted, could take it and answer in her own time. Eight more women were selected. Of the total of thirteen women, six were university graduates, six had college/secondary school level of education and one, primary school level. Of these, three were widows, seven were married, two were

cohabiting and one was separated (see Appendix 6.1, Chapter 6 for their profile). A focus group discussion was also held with five of the women who could find time from their busy schedules. For this group there was a deliberate selection of the 'elders' among the women interviewed who would be well versed in Baganda cultural practices. A different, open ended questionnaire was used. The questions were much fewer and centred around cultural practices about women, property, marriage and inheritance in Buganda.

These preliminary findings revealed that the more highly educated a woman was the more likely that she was able to have more control over family property and consequently her own life. There were however other variables such as the nature of her relationship with her husband. Baganda cultural practices at marriage and inheritance were seen as both positive and negative. The arguments centred on the *intention* of the tradition as *originally prescribed* by culture and custom and its current *interpretation* and practice by those who relied on it. The clan, especially the relatives of the deceased husband were seen as making inheritance of property difficult for the widow.

3.1.6 The media and inheritance.

Newspaper reports of widows and inheritance matters were also examined to give insights into attitudes and perceptions of the public at large. The media generally provides cases from across the country which reflect differences and similarities in practice. This is partly reflected in Chapter 1.

The results from the research so far documented provided the basis for the field work.

3.1.7 Research Locations

Masaka and Rakai were chosen as research locations because of the documented high incidence of HIV/AIDS related death leading to a large number of widows. The urban

sample was from Masaka town in Masaka District. This district has an urban population of 81,736 and a rural of 754,000 with a total of 838,736.(1991 Population census). The main economic activity includes agriculture, cattle ranching and fishing in Lake Victoria. Masaka town is about 80 Kms from Kampala. It is a thriving commercial centre with a small wealthy business community. Masaka district had the second highest number (7,435) of adult clinical HIV/AIDS in 1993 according to the Uganda AIDS Commission. Kampala city had the highest (9,674), (See Appendix 3.3). The widows interviewed were from within the town. The data collected was specifically on a widow's experience of widowhood and her responses to her situation. For the rural sample, Rakai district was chosen (See Map of Uganda after table of Contents). It borders Masaka district and life flows easily from one to the other. The main economic activities are agriculture, keeping cattle and fishing. Rakai district has an urban population of 14,600 and rural of 368,901 with a total of 383,501. Samples were selected outside one of the towns, Kyotera, within a radius of 10 Kms to 80 Kms. Rakai district had the third highest (1,872) reported adult clinical HIV/AIDS cases in the country.

The main objective in these areas was to gather information about Baganda cultural practices at marriage and at inheritance. There was also a special focus on individual women's experience of widowhood.

In both Masaka and Rakai, no prior arrangements were made with the interviewees. Widows and legal and civil opinion leaders were interviewed as found at a place visited. The focus group discussions were however organised after the individual interviews.

Three basic research methods were used for field work in these locations. They were interview with individual widows, the use of key informants and focus group discussions/participant observation

(a) Individual interviews

The widows were generally interviewed where they were found, without prior notification. The experience with the use of questionnaire in Kampala city meant a change in technique. I asked every widow interviewed to tell her story while I took down notes which gave her the freedom of expression, without confining her to specific questions. The themes and research questions were kept in focus during the interviews.

(b) Masaka Town

A local resident assisted with locating widows in Masaka town. Most of the widows were in some form of trade. I interviewed them in their business premises so that they could carry on working. They preferred to narrate their story while I took down notes by hand. There were few interruptions as people would come into the shop to purchase something. Some would stop and listen, while in a few cases, some joined in the discussion. I took down notes of the stock in the shop as this was probably an indication of the business status and standard of living of the widow. However I did not visit the home of any of the widows but they gave descriptions of the kind of homes and other properties they had. Most of them lived outside the town and came into town during working hours to personally run their businesses.

(c) Rakai

Two assistants, both female probation officers were enlisted to help with locating widows. This was primarily because they were working in Rakai district and were involved in a project with an NGO, Save The Children Fund, on the protection of the

property rights of orphans and widows. The district was therefore well known to them. Again no prior arrangements were made with widows except that permission was required from the Chairman of the RC areas visited. Most persons in this area are involved in some kind of agriculture, generally on a small scale for their home consumption with the surplus for sale. Some of widows were therefore found working in their gardens which was often just surrounding the home. Some were busy with household chores. I took notes of the type of building structure, the crops grown and animals kept, again a good indication of the living standard/property status of a widow. Again each widow, narrated her story. In many cases, there were two to three family members around who occasionally chipped in with their opinion or to remind the widow of an incident she had forgotten. The widows spoke quite freely, expressing their anxiety and frustrations or their pleasure with their good fortune. About half of the widows from both Masaka and Rakai had husbands who died of HIV/AIDS and a few of them were already showing signs of the infection and made no attempts to hide the fact. Some expressed anxiety over the fate of their children and the property should anything happen to them.

3.1.8 Focus group discussion/participant observation

Three focus group discussions were held. The first was in Masaka town with eleven women who had already been individually interviewed. This discussion helped to prepare for further individual and focus group discussions. Some of the respondents mistakenly thought the group discussion was called by a charitable organisation who had come to give material aid. Some therefore appeared to play at being the 'poor', 'wretched' and 'victimised' widow. However when the purpose was made clear, genuine sympathies offered, they talked more honestly. The discussion took about four hours.

In the rural setting in Rakai, two group discussions were held. The first was with 23 women and it took about six hours from the time the women gathered to the conclusion of the discussions. This was a mixed group of married and widowed women. Some of the widows had been individually interviewed a few days before. The group discussion was done at the home of one of these women and for this a prior arrangement was made. The second discussion was with a group of eleven men which immediately followed that of the women and took one hour. This group included some clan leaders and RC executive members. The purpose of this approach was to immediately follow up on issues raised by women about men's roles in marriage and at inheritance. It was as it were, giving men the chance to reply. Men and women were interviewed separately to allow freedom between the same sexes. This worked well. I did however ask the women if they would have preferred to be interviewed in a mixed group and there was a resounding no. When I put the same question to the men they were very keen although some observed that it would have inhibited the women.

3.1.9 Persons in authority

Persons in key positions in the area of research were interviewed. They were local leaders such as leaders of clan or executives in the RC, administrators and also judicial officers. This included men and women. The information gathered focused on their roles at inheritance and are reflected in the main discussions where relevant. Two major issues stood out. One was the conflicts that appeared to be between the various authorities in the execution of their duties since they all have authority to handle inheritance. Also their perceptions of how property settlement should be made varied. The other was the consequence of this on parties seeking a settlement. They often went to more than one authority because of the choices and this often caused more conflicts.

The whole process of documentary and data collection took 10 months from October 1993 to July 1994.

3.2.0 Urban/rural research experience

In the rural setting, people are more relaxed about time keeping. Their activities are mainly confined to cultivation or work around their homes, for which they can set their own time. Funerals especially with the AIDS pandemic would have interrupted the research substantially because of community concern for one another which often meant a whole village going to attend a burial. However the research process which excluded making prior arrangements avoided inconveniences. This method was not suitable in public offices in the urban areas, where a particular person may be in charge of an office. This was the case in the AG's office where only a senior officer had access to a key for the office I needed to use. He was often away at funerals and so I could not do any work unless he was available. Office hours in urban centres also dictate the time available. Getting information therefore took longer than in the rural area.

I had been warned by my assistants that respondents in the field, especially in Rakai district had research fatigue because of the constant flow of researchers visiting the area, an interest stimulated by the HIV/AIDs pandemic in the area. There was also the presence of numerous NGOs who were giving some kind of assistance and carrying out various researches. However, my research touched an aspect of the lives of women that had in recent years taken central stage in public concern. The AIDS pandemic highlighted inheritance concerns especially for a surviving spouse who was or could be infected and worried about her health and the plight of orphans left. It was therefore done at an opportune time and not affected by research fatigue.

The research process was however interrupted by two weeks due to the Rwandese war in 1994 in which thousands were massacred and some of their bodies thrown in

lake Victoria. Fishing is one of the main economic activities in Rakai. At that time of the research there was a general sense of horror within the indigenous population especially with fishermen telling horrendous stories of seeing mutilated bodies in the lake with some on shore. There were also refugees who had fled for their lives and told their stories. It was difficult to carry on the research in those circumstances.

3.2.1 Limitations and strengths of research

The research addresses only a small aspect of the whole 'problem' of widows and inheritance. It is also a sample study of the practice among the Baganda. It therefore cannot be used as a blanket example of what happens among the Baganda or for that matter among the other 56 ethnic tribes in Uganda. It is however an *indicator of some of the experiences* that women go through at inheritance. Another important aspect is that it is the 'voices' of the women concerned telling us their story/concerns from their perspective and giving us *images* of themselves and their values.

The AIDS pandemic has come adding a different burden to the struggles they were living with. Statisticians believe that household resources and agricultural output per household has depreciated, and increase in the number of orphans per household has also affected resources and health of families (Institute of Statistics and Applied Economics, Makerere University Kampala 1995). Generally it is the able bodied who are infected. In rural areas where agriculture is very important, this means a reduction in those who can work. Also persons who are ill demand a lot of care and therefore encroach on the time of those who should be out in the fields. This means a reduction in agricultural output. However it is believed that true projections will take some years to determine the actual impact on the economy and the social and political life of the Country.

During my research in 1994, about half of the women I interviewed had lost their spouses through HIV/AIDS (See profile of women interviewed in Masaka and Rakai - Chapter 7).

Some of the women had full blown AIDS. There were also numerous graves and deserted homes and large areas of uncultivated land in the villages I visited. The villagers informed me that in some cases all the family members had died or in some cases when family members died the remaining members would move to live elsewhere. It was difficult not to remain unaffected. I found that the RCs were playing quite an important role in these difficult situations. The numerous deaths often meant that traditional social structures of the extended family in caring for its members meant that their resources were over stretched where adults died leaving several children to a surviving adult. In some cases there were found to be only minor children caring for each other with the adults having died. Where there were only surviving children (orphans) living with relatives the RCs were taking responsibility to protect the property of these orphans especially of tender age by ensuring that the relatives did not sell them. Surviving widows who suspected that they might be infected or who had full blown HIV/AIDS were being encouraged by the RCs to make property arrangements for their children. The clan as the traditional institution charged with property distribution was also affected by the constant deaths and the loss of clan leaders.

The thesis does not dwell on the impact of HIV/AIDS on property settlement but there was evidence of general concern in the attitudes of some widows about property settlement for their children. The RCs informed me that in some cases where the deceased was known to have died of HIV/AIDS, his relatives did not want his wife to be given any property because "she would die anyway." Nabakooza's case which is examined in detail in Chapters 8 and 9 reveals her struggle to ensure that there was property for her children in the event of her death through HIV/AIDS which had killed her husband. She appeals to the sympathy of the court on the basis of her HIV/AIDS infection and the court responds with knowledge of the implication of that for her and her children and the estates in question. There is definitely need to carry out a comprehensive research on the consequences of AIDS on

property inheritance. It was however outside the context of this thesis and would have involved prolonged research.

The findings can be used to carry out further research in areas such as the impact of AIDS on family property and the making of wills.

3.2.2 The Challenge of HIV/AIDS

While the research does not go into the analyses of HIV/AIDS, in view of its presence in the research zone and the number of lives affected it is necessary to give some brief background of the circumstances in which the research was done.

According to the Ministry of Health (Uganda), AIDS is one of the leading causes of death among the adult population in Uganda. It is estimated that 12 per cent of the adult population are HIV positive. By June 1993 there were 41,193 Clinical AIDS reported, which is estimated by the Ministry of Health to be only 15-20 per cent of the actual number of cases (National Population Policy:1995). The age bracket most affected country wide is between 15-45. This is also the most economically productive age group (See Appendix 3.4). From the age of 15-29 years, females outnumber males in HIV/AIDS infection. There are a number of reasons, the major one being early marriages among the female population. According to the Uganda Demographic and Health Survey (1989), more than half of the women marry before they reach 18 years and no less than 60 per cent bear their first child in their teens. Health risks associated with pregnancy which reduce the immune system and continued child bearing put their lives at greater risk than that of men. Appendix 3.5 reflects infection by occupation and shows that housewives are among the most highly infected group. This means by necessary implication that their spouses/partners are also infected. My preliminary desk research at the Administrator General's office where deaths are reported for purposes of claims to the deceased's estate show that most deaths occur between 20-49 years with just over half through HIV/AIDS infection (Appendix 3.1 and

3.2). These were reported deaths from Masaka and Rakai District where I subsequently carried out my research. There is currently a very active AIDS Control Programme (ACP) under the Uganda AIDS Commission set up in 1990 with a call to the population to take on the challenge of curbing the AIDS pandemic. The ACP has carried out nation wide education on HIV/AIDS thereby increasing knowledge in the population (See Appendix 3.6). Their findings reveal that a very high percentage of the population has accurate knowledge of HIV/AIDS. The World Health Organisation (WHO) has recently revealed that the programme has resulted in the slowing down of the rate of infection in Uganda (Owen : World of Widows:1996). However because there are already many infected, death through HIV/AIDS continues to be one of the major causes of death in the country (ACP). Appendix 3.7 show future projections of the infection in the country.

3.2.3 Conclusion

Lastly the whole research process, though a eye opener, was full of disturbing experiences and the unexpected. There was the horror of the Rwanda massacre in 1995 with bodies floating in Lake Victoria up to part of my research zone, the reality of the impact of HIV/AIDS in my research, also among relatives, friends and colleagues in Uganda which continued through the stage of writing up the thesis. Then there was the tragic death of the WLEA researcher leader, (Jennifer Okumu Wengi) through natural causes in early 1997. She was a long time personal friend and would have graduated (Ph.D Law) in July 1997. It affected me profoundly. There is no doubt that the research process changed me academically and otherwise.

AGE	NO OF PERSONS	YEAR OF DEATH		CAUSE OF DEATH		MARITAL STATUS		RELIGIOUS AFFILIATION		SUCCESSION	APPLICANT			PROPERTY			
RANGE		80-89	90-93	Hiv/Aids	others	Married	Single	Catholic	Anglican	Muslim	Testate	Intestate	Widow	Adm. Gen	Others	Cash	House
20-29	3	0	3	3	0	3	0	3	0	0	0	3	0	3	0	0	3
30-39	23	2	21	12	11	22	1	16	6	1	5	18	6	14	3	8	15
40-49	14	5	9	6	8	13	1	8	6	0	2	12	1	11	2	2	12
50-59	13	4	9	4	9	13	0	8	1	4	6	7	1	9	3	0	13
60-69	5	1	4	0	5	5	0	2	3	0	3	2	2	0	3	0	5
70-79	6	2	4	0	6	6	0	4	2	0	5	1	0	4	2	0	6
80-89	2	2	0	0	2	2	0	0	1	1	0	2	0	1	1	0	2
TOTAL	66	16	50	25	41	64	2	41	19	6	21	45	10	40	16	10	56

Deceased Males

Source : Desk Research, Administrator General's Office, Kampala

Files : January to July 1993

APPENDIX 3.1

AGE	NO. OF PERSONS	YEAR OF DEATH	CAUSE OF DEATH	MARITAL STATUS	RELIGIOUS AFFILIATION	SUCCESSION	APPLICANT	PROPERTY			
RANGE		80-89	90-93	Hiv/Aids Others	Married	Single	Catholic/Anglican/Muslim	Testate Intestate	Adm. Genl Others	Cash	House/land
20-29	4	0	4	2	2	0	3	0	1	3	1
30-39	4	0	4	3	1	2	2	2	0	4	2
40-49	1	1	0	1	0	1	1	0	0	1	1
TOTAL	9	1	8	6	3	2	6	2	1	5	4

Decease Females

Source : Desk Research, Administrator General's Office, Kampala.

Files : January to July 1993.

APPENDIX 3.2

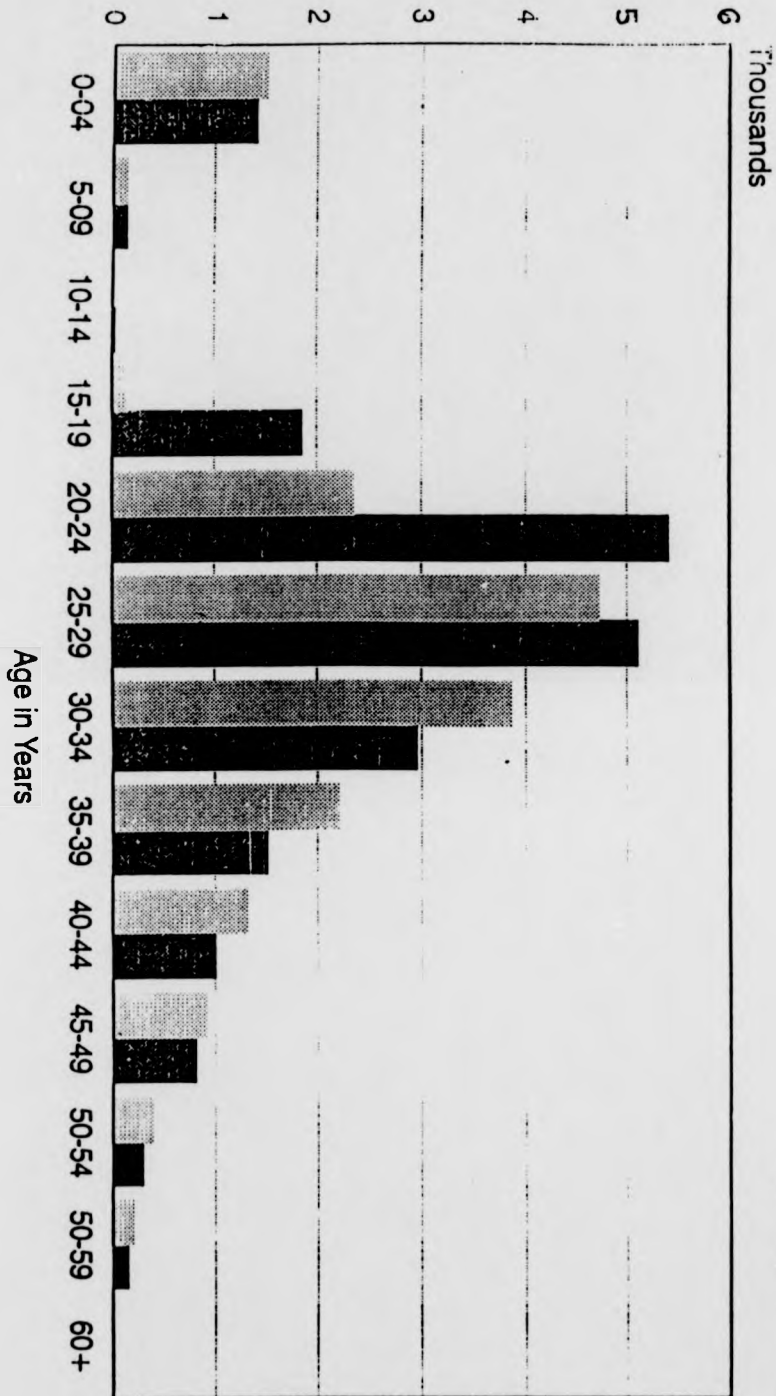
APPENDIX 3.3

Distribution of clinical AIDS cases by district of residence as of 31-12-1993

District	Adult AIDS Cases	Paediatric AIDS Cases	Cumulative Total
Apac	743	62	805
Arua	612	31	643
Bundibugyo	30	2	32
Bushenyi	566	21	587
Gulu	1383	41	1424
Hoima	248	7	255
Iganga	486	39	525
Jinja	1472	39	1511
Kabale	374	8	382
Kabarole	1451	110	1561
Kalangala	15	1	16
Kampala	9674	1463	11137
Kamuli	252	27	279
Kapchorwa	24	1	25
Kasese	1070	59	1129
Kibbale	7	2	9
Kiboga	5	-	5
Kisoro	74	1	75
Kitgum	633	68	701
Kotido	83	-	83
Kumi	144	7	151
Lira	743	10	753
Luwero	1476	120	1596
Masaka	7435	679	8114
Masindi	157	12	169
Mbale	409	33	442
Mbarara	872	24	896
Moroto	352	26	378
Moyo	28	1	29
Mpigi	2546	248	2794
Mubende	800	50	850
Mukono	1336	74	1410
Nebbi	622	17	639
Pallisa	31	-	31
Rakai	1872	140	2012
Rukungiri	239	6	245
Soroti	659	9	668
Tororo	672	22	694
Outside Uganda	57	4	61
Not recorded	637	125	762
Total	40289	3586	43875

SOURCE: AIDS CONTROL PROGRAMME

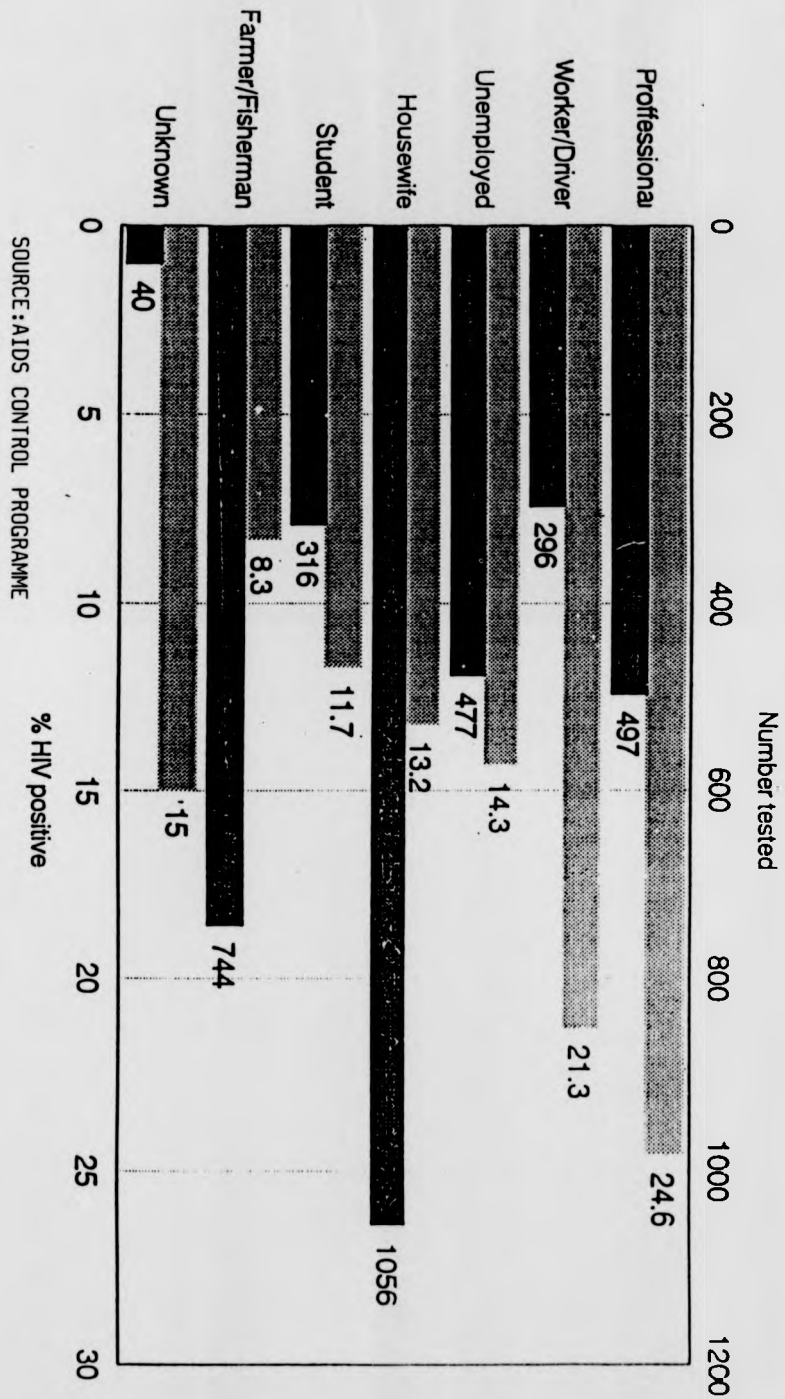
APPENDIX 3.4



SOURCE: AIDS CONTROL PROGRAMME

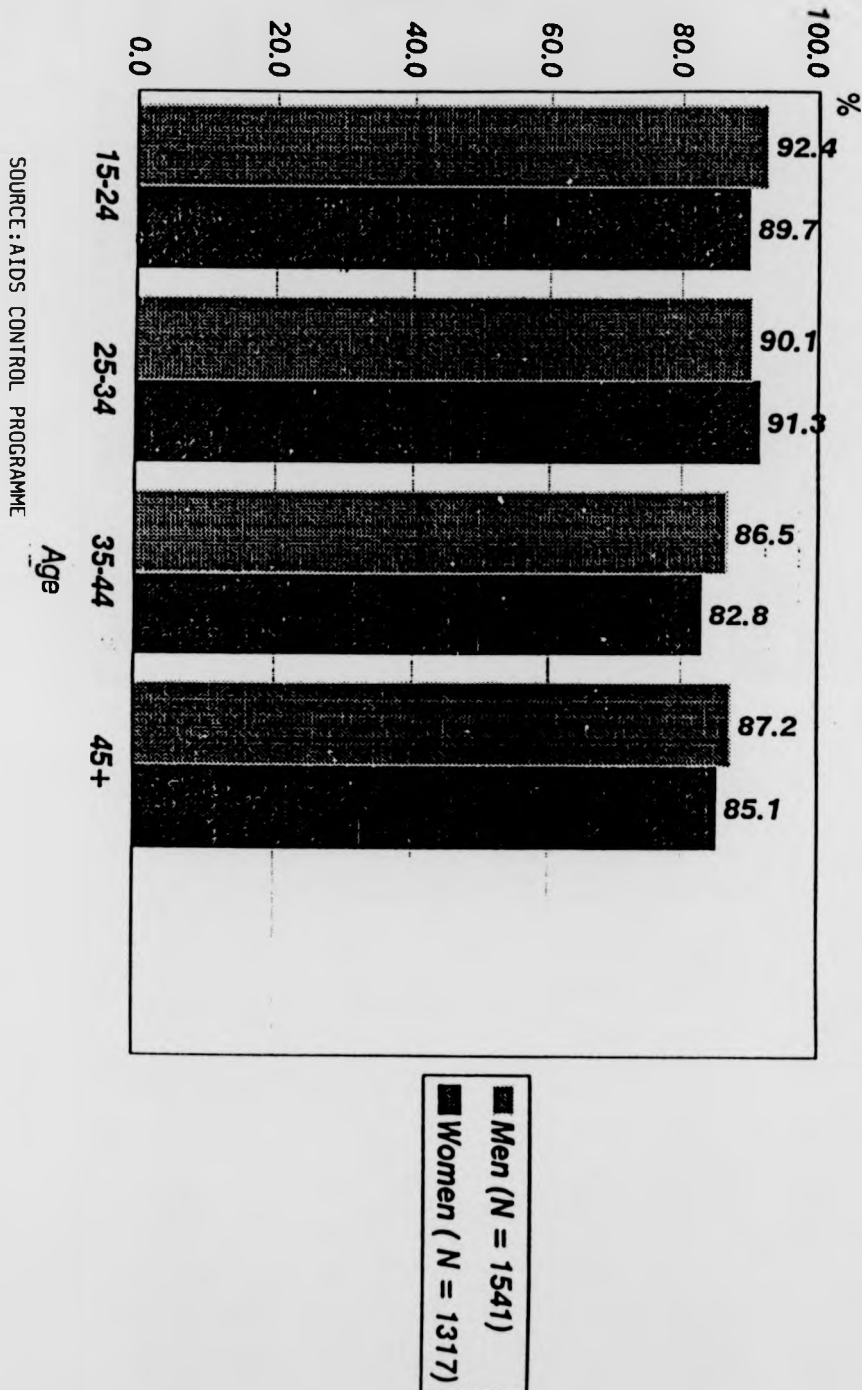
Age/Sex Distribution of Ugandan AIDS Cases (Reported as at December 1993)

APPENDIX 3.5

HIV infection rates by occupation as estimated by the 1987/88 National serosurvey

Accurate knowledge of AIDS by Age and Sex

APPENDIX 3.6



Age/Gender	1993 Currently living with HIV and AIDS		1998 Projected ¹ living with HIV and AIDS	
	HIV	AIDS	HIV	AIDS
0-14 years	116,000	37,000	221,000	60,000
15-19 years	132,000	6,000	160,000	9,000
20-49 women	571,000	56,000	694,000	83,000
20-49 men	529,000	52,000	642,000	78,000
50 +	168,000	14,000	204,000	21,000
Total	1,516,000	165,000	1,920,00	251,000
Maternal ² orphans	300,000		886,000	
- Adults - Children	Cumulative new infections 1993-98 673,000 294,000			
- Adults - Children	Cumulative death 1993-98 565,000 250,000			

¹ Projections are done under the assumption that the current level of intervention is maintained

² Cumulative number of children < 15 years who lost mother due to AIDS. Some of these will also have lost their father. Some (not included in the figures) will have lost the father only. The number who lost their father is difficult to estimate, as it is a function of the family structures. Sufficient information on this is not available.

Cumulative AIDS Cases by year

SOURCE: AIDS CONTROL PROGRAMME

Year	Total
1983	17
1984	29
1985/86	910
1987	3,284
1988	7,249
1989	13,339
1990	19,995
1991	30,190
1992	38,552
1993	43,875

APPENDIX 3.8

A LIST OF HOUSEHOLDS HEADED BY FEMALES

(IN UGANDA)

HEADSHIP BY SEX BY DISTRICT AND RURAL/URBAN: 1991 CENSUS

District	Rural	Urban
%	%	%
Apac	30	34
Arua	21	32
Bundibugyo	21	32
Bushenyi	29	35
Gulu	32	37
Hoima	25	44
Iganga	22	38
Jinja	22	27
Kabale	32	37
Kabalole	30	40
Kalangala	24	30
Kampala	00	31
Kamuli	21	38
Kapchorwa	28	32
Kasese	25	32
Kibale	25	43
Kiboga	27	44
Kisoro	36	37
Kitgum	36	40
Kumi	28	26
Kotido	56	36
Luwero	33	39
Lira	28	27
Masaka	31	39
Masindi	26	40
Mbale	22	35
Mbarara	28	33
Moyo	36	36
Mpigi	32	35
Mubende	27	44
Mukono	30	33
Moroto	63	27
Nebbi	27	35
Pallisa	17	40
Rakai	32	43
Rukungiri	33	33
Soroti	25	32
Uganda	28	33

SOURCE: POPULATION CENSUS 1991

CHAPTER 4

FORUMS OF DISPUTE SETTLEMENT IN UGANDA

4.0 Introduction

This chapter gives an account of the development and current status of various forums of dispute settlement including the state courts in Uganda. It examines the importation of 'foreign' law during the colonial period, its interaction with local customs and the changes in the judicial system that have taken place since then. The chapter pays particular attention to the changes in recent years - from 1986 when the current President of Uganda, Yoweri Kaguta Museveni took political power and introduced 'new judicial and administrative structures' of the Resistance Councils at local level to bring litigation nearer to the populace within the ideology of 'popular justice' and 'popular democracy.' The RC courts apply indigenous methods of dispute settlement. There are also the Magistrate courts, the High court and finally the Court of Appeal which apply English procedural and substantive law as well as customary law. This chapter examines the reasons for the creation of all these courts and the impact of the changes in the judicial system on the general administration of justice in the country. This sets the background and the context in which widows make their choices in dispute settlement. It also sets the background for the conflicts that emerge between individuals and officers of these forums as illustrated in Chapters 7 to 9.

The chapter begins with the history of the importation of English law into Uganda during the colonial period which had its own customary methods of adjudication. It examines the creation of the Statutory Courts and native courts during this time. Next the chapter examines the reasons for, and the creation of, the Resistance Councils and

the implications for justice for people. The chapter concludes by throwing light on the semi-autonomy created in the judicial system by these changes.

The empirical work was undertaken between 1993-4, six years after the Resistance Council structure was in place. The first statute was the Resistance Council & Committees Statute of 1987. This was followed in 1988 by the 'Resistance Committee (Judicial Powers) Statute' which has remained unchanged. However the 1987 Statute has gone through two amendments. In 1993 'The Local Governments (Resistance Councils) Statute' came into effect repealing the 1987 Statute, the 'Local Administrations Act' No. 18 of 1967 and the 'Urban Authorities Act', incorporating them into one Statute. This increased the administrative powers of the Resistance Councils. This was followed in 1997 by 'The Local Governments Act, No.1 of 1997' which repealed the 1993 Statute. The main purpose of this Act is to implement Government Strategies for decentralisation and democracy as enshrined in the new 1995 Constitution. It made significant changes especially to the political powers of the Resistance Councils and changed the name to 'Local Councils' in the relevant statutes. The 1997 Act will be discussed in the conclusion of the thesis as it falls outside the research. It has significance for the role of these Councils in decentralisation of State powers and functions and especially in democratic participation by the ordinary person. It also has a special focus on women's place in decision making.

4.1 The Judicial System : Pre-Colonial

Before Uganda became a British Protectorate in 1890, each tribe was governed by its own indigenous body of customary laws. These laws had considerable similarities which transcended ethnic groupings. For example they were unwritten, there were no law reports or legal representation. Compensation, mediation and reconciliation were common forms of settlement. However there were also major variations in their

context and structure and in the manner of their administration which reflected ethnic differences in their social arrangements and kinship systems, their cultural practices, religious and traditional beliefs and their different stages of economic and political development (Morris and Read:1966). In the then kingdom states of Buganda, Bunyoro, Ankole and Toro, customary legal matters and administration matters were presided over by kings and their chiefs. In the rest of the country where there were no kingdoms, they were presided over by chiefs and less institutionalised gatherings of elders or clan leaders. An important aspect of the kingdom states, especially Buganda, was that there were more formalised courts with record keeping.

4.1.1 Establishment of courts

The presence of already established local order meant that the colonial administrators had readily available avenues through which to effect their policies. Agreements were therefore made with the local rulers in the then Uganda Protectorate through which a series of arrangements and ordinances were effected. These provided the basis for the judicial system throughout the life of the Protectorate. Allot (1965:220, 1970:11) sums up the general position adopted by the Colonial Administration as, "a fundamental revolution" in African legal arrangements, with far reaching consequences which are still being felt in these African states today;

"the nature of the revolution varied somewhat with different colonial powers, but in general each power first introduced its own legal system or some variant of it as the fundamental and general law of its territories, and second, permitted the regulated continuance of traditional African law and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to 'civilised' ideas of justice and humanity."

The method adopted by the colonial administrators, of imposing a new system on ongoing social arrangements, without an understanding of the social context and the resilience of the structures within it clearly set in motion the subsequent conflicts in the implementation of legal rules in the colonies.

4.1.2 1902 Order in Council :The turning point in Uganda's legal system

The Order in Council of 1902 (as amended by the 1911 Order in Council) provided for the wholesale reception of English Law in Uganda. This marked a major turning point in Uganda's legal development. It provided (Morris and Read 1966:240) that, the Common Law, doctrines of equity and Statutes of general application in force in England were to be in force in Uganda only so far as the circumstances of the Country and its inhabitants permitted. Secondly, that in the making of ordinances, the Governor of Uganda who represented Britain, was to respect existing native laws and customs unless these were contrary to justice and morality. References to "Native" or "African" in any law enacted before July 1963 were construed as referring "to a person who is a member of an indigenous African tribe or community or to a body corporate or incorporate entirely composed of such persons. "Non-Native" and "non-African" were construed accordingly (Interpretation(Special Provisions Act) Cap 17). Lastly, the courts were in all cases to which natives were parties, to be guided by native law and custom where this was applicable and not repugnant to justice and morality and not inconsistent with the general law. The amending Order of 1911 was generally intended to guide and not to restrict the application of English Law in Uganda. This order was later amended at Uganda's Independence in 1962 by the Judicature Act No.62 of 1962 and later by the current Judicature Act No. 11 of 1967, an Act which still carries the substance of the 1902 Order in council as stated above.

4.1.3 Native Courts

In conformity with the 1902 Order in Council as amended, the Native Courts Ordinance of 1902 gave the Governor of the Protectorate the powers to establish African Native Courts. By 1924 these native courts had been established in all districts.

These were county and sub-county courts in the non-kingdom states. In Busoga and the kingdoms there was "a court of the Lukiko chiefs" with county and sub-county courts below (Morris and Read:1966). The native courts were comprised of benches of chiefs who administered the native law and custom of a particular district. To ensure some measure of control over these native courts, the 1902 Ordinance provided for the procedure to be used in them. The powers of supervision, revision and appeal over these courts were exercised through the district magistrates of the administrative service in the Subordinate Courts at district level. Figure 4.1 illustrates the Appellate jurisdiction of the courts during the Protectorate (1902-1962). Appeals from the native courts lay to the subordinate courts (Magistrates Courts), from subordinate Courts to the High Court which in turn lay in general to the Court of Appeal for Eastern Africa which court was established in 1902, with a further and final appeal to the Privy Council sitting in the United Kingdom.

There is a remarkable similarity in the structure of the court in 1902-1962 (Figure 4.1) and the current structure of 1988 (Figure 4.3). Both the structures provide for separate courts at grassroots to administer local customs with local leaders as arbitrators. Although it is generally argued by the State that it is intended to reflect respect for indigenous laws and leaders and to meet the needs of the indigenous peoples, it generally has political significance. The steps taken by the Colonial administrators and the Government of Museveni reflect the intention of legislators and administrators to win the support of the indigenous population who are also the majority, for the effective implementation and administration of their policies. President Museveni's thinking behind the setting up of the RC system is discussed further on.

4.1.4 Integration of the Courts

The Protectorate government saw it necessary to have a closer link between the central administrative structure and the judicial structure at grassroots. It therefore enacted the African Courts Ordinance 1957 (Cap38) later amended to the African Courts Act (Cap 40). This paved the way for the eventual integration of the native and central Government systems. Once again, this is reflected in the first statute enacted by the NRA/NRM government-The Resistance Councils and Committees Statute (1987) in which the RCs are integrated with central government structures through the offices of the Central Government Representative (CGR) and District Executive Secretary (DES). It is also in line with the NRM/NRA policy for ease of administration and political influence at local level, a topic discussed further on.

4.1.5 Integration after Independence of Uganda in 1962: 'Top-Bottom policy.'

The next major move at integration was the enactment of the Magistrates Court Act of 1964 (Cap36) which empowered the Chief Justice to divide Uganda into Magisterial areas each with a Magistrate's Court. Consequently when a Magisterial area was created in a District, the Subordinate Courts and the African / Native Courts ceased to exist. The Magistrate's courts were however empowered to apply customary law in customary cases. The policy then was to bring administration of justice closer to the 'top' administration. This was the new Independent Government's approach to administration. Figure 4.2 illustrates the appellate jurisdiction of the Courts as they stood until President Museveni came into power in 1986 and re-introduced in 1987, the 'Native Courts' (Figure 4.1) as Resistance Councils Courts (Figure 4.3).

What is significant in the development of the Court system was that it began with the recognition of the need for a separate Native Court at grassroots that applied a system

of customary/native law that was relevant to its indigenous peoples and the local cultural context. This won the cooperation of the "natives". It also made access to justice easy for the local population. The modernisation of these Native Courts in 1964 by the Independent Government in the transfer of the judicial system to the Magistrate's Court and higher courts made justice far removed from persons at grassroots, in distance, because the courts were located in urban areas. It was also far removed in the general procedure and settlement of disputes. The Magistrates courts require fees, specialised legal procedures involving qualified officers. English is the language of the court although there is interpretation during proceedings into the language of the litigants who do not understand English. Criminal and civil offences are settled by imprisonment and/or a fine among other things. This method of dispute settlement was unlike conciliation and compensation in the native courts. Writing about the disabilities that women face under the law, Dwyer (1984:518) made a general observation about obstacles to the administration of justice ;

"law is everywhere costly, and the total legal control of any group is prohibitive. Indeed, the legal systems of all complex societies seek to limit cost by elaborating stipulations that repel cases: multiple considerations of some cases before judgement is rendered, the intermittent convening of courts, and jurisdictional limitations, as well as financial requirements (for example, fees or witness costs) which discourage resource poor, time constrained persons (most women) from litigation."

With the exception of the RC courts, the rest of the courts are still run according to English procedural rules and many statutory court buildings still bear the mark of the Colonial administrators because they were built during their time.

4.1.6 Application of Statutory and Customary Law : Semi-autonomy

The imposition of a foreign legal system in Uganda was the general pattern followed by the British Protectorate in its African territories. This dual system of law existed side by side with each operating within its own sphere of jurisdiction and hierarchy of

courts while at the same time interacting upon one another to some extent. The conflicts that resulted from this is argued by Falk Moore (1987:7) as being a consequence of an intrusion by the legislator on an *"on going social field that has areas of relatively autonomous activity and self regulation."* As a self regulating and long established regulatory regime, it was inevitable that customary law *"would fight any encroachment on autonomy previously enjoyed."*(1978:80). Falk Moore argues that legislators often pass laws with the intention of bringing reform on the already existing social arrangements without recognising the strength of these social arrangements in influencing the decisions and actions of people belonging to the social organisations in either obeying or disobeying, or giving it their own interpretation and methods of application. The depth of this problem was not understood nor the long term consequences foreseen by the colonial legislators and it has remained a deeply rooted problem in the administration of justice in the country. This is reflected in the research findings, especially in the study of Nabakooza's case in chapters 8 and 9.

4.1.7 Customary Law as a main regulatory regime in the society

The thesis places emphasis on the place of customary law within the regulatory regimes in society. Generally the family life of the indigenous population is guided by kinship ideology which is rooted in customs. Marriage and inheritance practices in particular are regulated by customary practices irrespective of what the written law provides. Customary law also touches the very heart of women's struggles and as revealed in Chapters 5 and 6, is perceived as creating a subordinating environment for women.

4.1.8 Definition of customary law

Under the current law, section 37(1) of the Magistrates Courts Act of 1964 (Cap 36) of Uganda Laws, Civil customary law is defined as:

"the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament."

During the colonial era the difficulty in defining customary law and the extent of its applicability created conflicts between the legal system that applied the statutory (English) Law and the local courts that applied customary law. The problem appeared from the onset to have arisen from the attitudes of the British judges. Allot (1970:145-181) illustrates the struggles that British judges had in defining custom and/or accepting it as law. He quotes the case of Re Southern Rhodesia [1919] AC 22 where their Lordships of the Privy Council stated ;

"some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society... On the other hand, there are indigenous peoples whose legal conceptions though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights under English law." (1970: 149)

This statement reflects the dilemma in trying to use the same criteria for the application of statutory and customary law. They are different in nature and form but no less different as instruments of justice for the persons to whom it applies. To the indigenous person customary law is law. It is conceptually different from the imported law but it is understood by the cultural context from which it is derived. The imported law is not perceived as '*law applicable*' by the indigenous population because it is incompatible with their social organisation. It is not seen as concerning them but as concerning persons from where the law was imported. Allen (1949:64) in his definitive study of custom as 'law' within its context stated:

"A custom, in the intendment of law, is such a usage as hath obtained the force of a law, and is in truth a binding law to such particular places, persons and things which it concerns."

British judges in West and East Africa often referred to 'native law' as foreign law meaning that African customary law *was foreign to them* because it was not within

their knowledge or understanding and therefore had to be proved as a fact like general /statutory law.

In Uganda this issue was tackled in the case of Kajubi v. Kabali (1944) 11 EACA 34 by the East African Court of Appeal. Referring to the Privy Council's judgement in a Western African case of Eleko v. Officer Administering the Government of Nigeria [1931] AC 662 at page 673 where it was held that:

"It is the assent of the native community that gives a custom its validity, and therefore barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate."

In Kajubi's case it was held at page 37 that ;

"The native community may assent to some modification of an original custom but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be made by a court of law. However it was recognised that 'a native custom may of course also be altered or abrogated expressly or by legislation.' "

The fallacy of the decision in Kajubi's case lies in the court's assertion that custom can be altered or abrogated by legislation. In the Statutes, yes, but the purpose of the statutes is to alter the actual on going custom/social arrangement on the ground. The State (Legislators) can attempt to do so through the use of force or through coercion and may achieve some success. But ultimately, the society needs to embrace the intended changes or to have developed to a stage where the environment for changes are already set in motion.

Vinogradoff (1925:Ch 2), an anthropologist, cited in Falk Moore (1978:14) asserted that ;

"... In rudimentary unions, in so called barbaric tribes, even in feudal societies, rules of conduct are usually established, not by direct and general commands, but by the gradual consolidation of opinions and habits. The historical development of law starts with custom. Rules are not imposed from above by legislative authorities but rise from below, from the society which comes to recognise them.

The significance of this statement lies in the recognition of '*the bottom-up approach*.' That '*rules rise from below*, from the society which comes to recognise them.' Legislators are often faced with the practicality of implementing or applying law at grassroots. It is the acceptance of that particular rule or law by the society which it is meant to govern that gives it in the true sense its acceptability as law and therefore the 'force of law.' This also has implications for legal and administrative officers. As long as 'their' law is not acceptable to the society to whom it is meant to apply neither will their authority be. This is reflected in Nabakooza's case where the clan comes into conflict with legal and administrative officers. A compromise that recognised the spheres of influence of both law and custom stopped the conflict.

4.1.9 Proof of Customary law

The Evidence Act of Uganda Cap 43, s.46 provides that when a court has to form an opinion as to any general custom or right, the opinions of persons (assessors) likely to know of such custom or right are relevant.

In the years of the Protectorate, customary cases rarely came up in the British Courts and where they did assessors were called upon. However the position was quite different where a Native Court had already made a finding on customary law and it went on appeal to a British Court. Referring to the position of the Buganda native Courts in the case of Kiazi v The Lukiko (1943) N.S.D:7), Whitely C.J. held that ;

"...They have few written laws and no reported case law and consequently they are for the most part administering customary law. Justice is administered by the High officials and chiefs who are themselves familiar with the customs of their people and generally speaking require no evidence to inform them what these customs are. In the great majority of cases in their courts turning upon customs, it would be unreasonable to expect evidence as to custom. In the few cases where there might be a doubt as to what the custom actually is, it might be desirable or even necessary that evidence be adduced on the point. It would I think be dangerous to lay down any hard and fast rule." (see also Morris and Read 1966:258).

Consequently, British judges tended to respect the decisions of native courts in customary matters basing their authority on the decisions of elders /clan leaders in their community who were well versed with the particular customs. Their findings were treated as one of fact.

The important role played by the elders or clan leaders has continued to be respected in present judicial system especially at the grassroots in the RC courts. Empirical findings discussed in Chapters 7-9 reveal that clan elders are generally elected to serve as arbitrators in the RC courts. They also play significant roles as main decision makers at marriage and inheritance as reflected in Chapters 5 and 6.

As already observed, the judicial system remained the same from independence in 1962 until 1987 when major new changes were brought in, especially at grassroots.

4.2.0 Judicial System from 1987: Popular Justice and Popular Democracy

Uganda went through political instability from the early 1970s to 1986. For most part, it was under the military dictatorial regime of Idi Amin and subsequently under the Uganda People's Congress (UPC) in the Obote II regime. Dr. Milton Obote was the first Prime Minister of Uganda at Independence in 1962. He was subsequently deposed by his military officer, Idi Amin, in 1970. However, with the help of the then President of Tanzania, Julius Nyerere, Obote made a come back in 1981 under a regime which proved to be unpopular. Consequently when the National Resistance Movement/Army under President Museveni captured state power in 1986, their first attempt at winning popular support was to introduce the ideology of "popular justice and popular democracy" to the population (Barya et al:1994). This was to be nurtured and sustained through administrative and judicial structures established in all Districts, beginning from grassroots and known as Resistance Councils and Committees.

4.2.1 Resistance Council and Committees

The first statute to be passed was the Resistance Councils and Committees Statute (No.9 of 1987). Its primary purpose was ;

"To provide for the establishment, duties and functions of District Administrators, Resistance Councils, Resistance Committees, District Development Committees and Administrative offices, And For Other Matters Connected Therewith."

Consequently within each of the 39 districts in the country was established a District Administration with five levels of Resistance Councils (Appendix 4.4). The operation of these institutions was to be under the overall supervision of a District Administrator (DA), who was appointed by the President of Uganda, and was the political head of that District (S.19(2)). His main function was to provide political direction in the district. This involved organising the setting up of Resistance Councils and Committees in the district through which Government policies and programmes were to be implemented. The DA was to be assisted by the District Executive Secretary (DES) who was also the Chief Executive Officer. The DES was to supervise and co-ordinate all activities of Government Departments in the district including the implementation of District Resistance Councils policies and decisions and to integrate the services of the District Administration and the Government in the District. Whereas the DA was regarded as a political figure with a "top bottom" policy approach and also not easily approachable, the DES was regarded as the person close to people at grassroots with a "bottom up" policy approach. He had the more difficult task of being the link between the local populace and the State and of ensuring harmony and co-operation between them. One of his main duties was to perform all statutory duties and functions which under any law vested in the former office of District Commissioner. This included the performing and registration of marriages. He also had power to settle inheritance

cases and in this respect, represented the Administrator General. Consequently his office was often flooded with complainants and claimants to a deceased's estate.

4.2.2 Structure of Resistance Councils

Under the 1987 Statute the Districts were divided into councils in order of ascent, as follows (Part II, Sections 2(1-6));

(a) Village Resistance Councils (RCI), Parish Resistance Councils (RCII), Sub-county Resistance Councils (RCIII), County Resistance Councils (RCIV), District Resistance Councils (RCV), (Appendix 4.4).

The divisions in Kampala, the capital city and of the main towns in the districts and the Municipalities were different from the divisions in the rural areas because of their different characteristics. Thus for Kampala city they were in ascending order known as;

(b) Cell Resistance Councils, Village Resistance Councils, Ward Resistance Councils, Division Resistance Councils and Kampala Resistance Council.

For every town they were namely;

(c) Village Resistance Councils, Ward Resistance Councils and Town Resistance Councils.

For every Municipality they were;

(d) Village Resistance Councils, Ward Resistance councils, Division Resistance Councils and Municipal Resistance Council.

The Statute only prescribed the numerical structure of Resistance Councils for the urban centres where the physical structure is generally planned by the town planning council. It does however give some idea of the general numerical structure of the councils in both urban and rural areas. The numerical structure is as follows (Section 2 (3)) of the 1987 Act;

- (a) a cell comprises not less than ten and not more than thirty homesteads;
- (b) a village comprises not less than ten and not more than fifteen cells;
- (c) a parish comprises not less than ten and not more than fifteen villages; and
- (d) a division comprises not less than ten and not more than fifteen parishes.

4.2.3 Composition of Resistance Councils

According to Section 3, a Village Resistance Council consisted of all persons of or above the age of eighteen years residing in the village. Within any district there would be several villages therefore several separate village councils. Each Village Resistance Council elects a Committee known as a Village Resistance Committee. All the members of these Village Committees form a Parish Resistance Council. Each Parish Resistance Council also forms a Committee and all these Parish Committees in turn form a Sub-county or Town Resistance Committee. This continues to the highest level of District Resistance Council. The picture that emerges is that of a broad base administrative and legal structure at grassroots that gradually narrows to the top. It was through these Resistance Councils and Committees that the State intended to carry out its policies.

4.2.4 Functions and Powers of Resistance councils

A Resistance Council was to be a policy-making organ within its area of jurisdiction (S.6) of the 1987 Act. It was to identify problems within its locality and find solutions. It was also empowered to make bylaws in consultation with its District Resistance Council which was in turn empowered to make bylaws for its own district in respect of any of the powers, duties and functions of Resistance Councils and Resistance Committees. The bylaws were to be approved by the Minister (of Local Government) who also had the power to delegate any function to a Resistance Council. Every head of a Government Department at Parish, Sub-county, County or District level was to be

an ex-officio of the Respective Resistance Council and had the right to participate in their deliberations though not to vote. Responsibility for the implementation of the policies and decisions made by Resistance Councils was that of their Resistance Committees. In essence Resistance Councils were the link, through their Committees, between the Government and the local populace and therefore intended to facilitate government influence in their locality and in the process express the thinking at grassroots to policy makers.

4.2.5 Composition of Resistance Committees

Section 10(1) of the 1987 Statute provided for the establishment of a Resistance Committee elected from the members of each Resistance Council. The Committee comprised of a Chairman and Vice-chairman and seven other persons known as Secretaries and who were individually responsible for Women, Youth, Information, Mass Mobilisation and Education, Security and Finance. The Secretary for Women was required to be strictly a woman. These committee members were locally elected and were usually respected male and female members of the community. In the rural areas they were generally clan elders, chiefs or local opinion leaders.

The offices of Women, Children and Youth were meant to cater for the vulnerable or neglected groups in society. The rest were what the State saw as priorities in society and which should primarily be under the administration of the local population. Critics of the RC system (Byra et al:1994), saw the offices of Information, Mass Mobilisation and Security as the State's "avenue" of control of the local population. Through the office of Mass Mobilisation the State could easily mobilise people for its activities while the offices of Information and Security were regarded as the "ear" of the State. Women's groups however appeared to welcome the office for women although some critics saw the creation of that office as not meeting the needs of women especially in

rural areas where women tend to have separate groups with women leaders and generally avoid sharing leadership platforms with men. In some villages men were found to hold the office reserved for women because women were reluctant to take up the posts (Okumu Wengi Ph.D Thesis 1995).

4.2.6 Functions and Judicial Powers of Resistance Committees

Resistance Committees were responsible for assisting the police and chiefs with maintaining law and order, maintaining security in their locality, encouraging self help projects, recommending persons to be recruited in the Army, Police and Prisons and the like. The Resistance Committees were also to be communication channels between Government and the local people and to oversee the implementation of Government policies in their area. They were directly responsible to their Resistance Council in making reports on their progress and the extent to which the decisions of the Resistance Council and Government policy had been implemented. They were also empowered to constitute themselves into a *court*. The 1987 Statute gave the Resistance Committees wide judicial powers. It prescribed under Section 14 (3) that;

"A Resistance Committee shall have power to hear such cases as may be provided for under any written law and shall, when hearing such cases, follow such procedure as may be prescribed under any written law." (My emphasis)

Section 14 (4);

"Where any person is suspected of having committed an offence under any law other than a bye-law made by the Resistance Council, the Resistance Committee shall direct the arrest or detention of such person and shall hand him over to the police or a chief within twenty-four hours of such arrest or detention."

These powers under Section 14(3) meant that the already established courts were being divested of some of their powers. Most of the population is rural with high illiteracy rates. This meant that untrained (in the law) men and women were being given powers to handle cases in which they had no knowledge of the required

procedure or sentences to be passed. These powers were seen by the already established judicial system that applied statutory law to be too wide, and the handling of serious criminal cases which required imprisonment under the Penal Code Act, rather than the compensation being ordered by the RCs, abuse of the law. Consequently on 28th January, 1988, 6 months after the 1987 Statute, the Resistance Committee (Judicial Powers) Statute of 1988 was enacted. It was ;

"A Statute to provide for the Judicial Powers of Resistance Committees, to establish Resistance Committees as courts, *define* their jurisdiction, powers and procedure and for other purposes connected therewith." (*italics mine*)

All the RC committees were established as courts with RCII and RCIII courts having appellate powers. Thus within the overall judicial structure, the RC courts were as in Figure 4.3.

4.2.7 Limits of RC Judicial Powers

According to section 4 of the 1988 statute, the jurisdiction of the RC courts does not include criminal matters and is limited to certain civil matters specified in the second schedule. This includes customary tenure, marital status of women, identity of customary heirs, paternity of children, impregnating and elopement with a girl under 18 years and customary bailment. All these areas reflect relationships which are already within customary practices and are often dealt with under custom except where the parties opt for statutory law. These areas are also within family relationships and affect women's lives significantly.

Under the 1988 Statute, no party is to be represented by an advocate except where a bye law has been violated. The complainant and the accused represent themselves bringing their witnesses.

4.2.8 Language of the court

The language of the court according to Sections 14 and 37 of Statute 1988 is "the language that the court may determine to be its language." This in most cases means the main indigenous language of the locality in which the court exercises its jurisdiction. In an urban area like Kampala city where one finds many different tribes, English becomes the 'language of the court.' However, where any party to a suit does not understand the 'language of the court', the court is duty bound to find an interpreter.

A complainant is expected to institute a suit in the RC court within the local limits of the jurisdiction where he/she lives or where the offence was committed. The suit should begin in the court of lowest grade that is RCI (Section 5, 1988 Act) and lie on appeal to RCII then RCIII. RC court proceedings is informal and the court sits in any place convenient to it. In the rural areas, courts often sit outside, and often in the compound of the Chairman/Vice Chairman. The advantage of this is that cost, time and distance are minimised. The atmosphere is 'local' unlike the formalities in the English courts. This means easy access to 'justice' for the great majority at grassroots. The relief granted by the court is generally reconciliation, declaration, compensation, restitution, costs, apology, attachment and sale (Section 7, 1988 Act). These remedies generally reflect the relief granted in the Native courts during the pre-colonial and colonial era.

Cases from RCIII as the highest appeal court at grassroots lie on appeal to the Chief Magistrate and then the High Court. The Magistrates Court and the High court are empowered under section 15(1) of the Magistrate's Court Act of 1964 (Cap 36) and Section 8 of the Judicature Act to apply customary law provided it is not repugnant

and not in conflict with any written law. These higher courts are empowered to reopen cases from the RCs where it proves necessary. This is a reflection of the legislator's caution with the judicial powers of the RC courts whose officials do not require any legal training except knowledge of local customs.

The reintroduction of the local or 'native' courts as RC courts which are meant to encourage popular justice and bring a fundamental new change has created a new attitude in the local populace about the traditional courts versus the courts that follow English procedural and substantive law. The RC courts often challenge the decisions of the Statutory courts when it involves matters of custom. As revealed in our research findings, often clan elders in rural areas are elected as committee members. They are guardians of customs and often seek to maintain the status quo irrespective of current legislation to the contrary. The conflicts created in the judicial system in the administration of justice as shown in Chapters 7-9 were spin-offs that the State had not fully anticipated.

4.2.9 The Local Government (Resistance Councils) Statute, 1993

In 1993, the Resistance Councils and Committee Statute of 1987 was amended to read as 'The Local Government (Resistance Councils) Statute of 1993'. This was in line with Government's continued policy of decentralisation and more democratic participation by the local people in their communities and the State. Its main features remained the same as the Statute of 1987. Its objective was described as follows. In Section 2 (1993 Statute);

"The object of the Statute is to create a process of decentralisation whereby functions, powers and responsibilities are transferred from the central Government to the Local and from the higher Local Governments to the lower Local Government Councils, in order that governmental decisions are taken as close as possible to all those involved."

Its overall purpose being ;

" A Statute to provide for the decentralisation of functions, powers, and services to Local Government (Resistance Councils) to increase local democratic control and participation in decision-making, and to mobilize support for development which is relevant to local needs."

The powers and functions of the 'higher Resistance Councils' for example, District, City, Town, were increased to allow them to exercise "all political and administrative authority and provide services as each deems fit (Section 11(1)), subject to powers reserved for the Central Government and the law (Section 11(2)). The lower Resistance councils, meaning those in the rural areas, were to be primarily policy making organs within their areas of jurisdiction (Section 11.(3)). In general all Resistance Councils had power to make local laws not inconsistent with the Constitution or any other enactment by the Legislature (Section 14(1)). They could also make bye-laws for the conduct of their meetings and business (S.15(2)). The composition of RCs remained the same as in the 1987 Statute. The Resistance Council Committee of each RC continued also to sit as a judicial body.

The 1993 Statute however revised the composition of the Resistance Council Committees. The Vice-Chairman now also held the office of Secretary for Children's welfare, the Secretary became the General Secretary, a post for Secretary for Social Services and Education was created. The rest of the posts remained the same. Also the judicial powers to hear cases remained the same as in the statute of 1988 (Section 18 (3) & (4) of 1993).

Under the 1993 Statute the post of the District Administrator was changed to that of Central Government Representative (CGR) and his political and administrative powers increased (Section 23). He represented the Head of State and the Central Government. His powers included monitoring the implementation of all Government projects, programmes and services, including immigration and border liaisons, defence and security and addressing Resistance Councils on matters of a national nature. Although

the Government had decentralised its powers, through the CGR it was ensuring that it had a firm grip of what was happening in each District and in that way ensuring that its interest was being served. Byra et al (1994) dwell on this in their analysis of the RC as an instrument of 'Popular justice and popular democracy' discussed further on.

The post of the District Executive Secretary (DES) remained the same with the important task of co-ordinating and supervising all activities of District Resistance Councils and implementing their decisions. In essence, the DES had the greater task of making the RC system workable. In an important move, the Government reintroduced the post of Chief in each sub-county and parish, that is in the rural areas (Section 32). The Chief had administrative powers. He was responsible for collecting revenue, ensuring peace and security and had powers of arrest. Some of these were powers which they exercised during the Colonial era and at Independence and indeed before President Museveni created the RCs. The office of the Chief was therefore familiar to the local people. This reintroduction would therefore facilitate a faster and readily acceptable decentralisation. The Chiefs were not given judicial powers which they formerly exercised but they were required to supervise and inspect the implementation of decisions made by the RCs. In many ways there was an overlap of their responsibilities with RCs. The law did not stop a Chief from being elected to a Resistance Council Committee. Consequently, sometimes a Chief was also found to be Chairman of a Resistance Committee and this fitted in with their already established duties.

A very important introduction to the RC system was remuneration for members of the Resistance Councils and their Committees (The Local Governments (Councillors Allowances) Regulations 1993) (First Schedule). All previous RC work was done voluntarily. Resources were not provided for recording meetings and especially for the

Resistance Committees for the recording of their court proceedings as required by law (Section 15.(1) of 1988 Statute). The effect of this for parties in a suit is noted in the analysis by Byra et al (1994).

4.3.0 Popular Justice and popular Democracy as instruments of judicial efficacy

In its early years President Museveni's leadership was known for often criticising the judicial system and its officers for being elitists, corrupt and irrelevant for the prevailing conditions in the country. Museveni therefore sought to alter radically the administration of justice through a system of popular justice and democracy. Barya and Oloka-Onyango (1994:37) briefly analyse the theory of 'Popular Justice' within a democratic society. They observe that it is acknowledged in political theory that an essential prerequisite of a democratic society is the effective involvement of the popular sections of society in the political process of decision making. This involvement would directly impinge on their political, economic, social, cultural, legal and institutional existence.

They note that the question of popular justice would evoke, on one hand, opposition from those who would equate it with "mob justice" and, on the other hand, those who believe that unless the broad sectors of society actually control the fashion in which the judicial power is exercised, there cannot be a democratic government (1994:37-38).

Within the African scene, the relevance of popular justice was put more aptly by the late Lubowski (1989:18) in Barya et al (1994:35) when advocating for a more decentralised and popular adjudicatory system for an independent Namibia.

"People should be encouraged to use informal arbitration and mediation to resolve minor disagreements - people's court at the best. Communities should be encouraged to elect individuals from among themselves to act as arbitrators in certain matters... Such local courts should... be staffed with judges elected from the communities they serve - not necessarily legally trained people, but persons known in the community for their sense of justice and fairness. Like small claims courts, such courts would have a limited jurisdiction, and legal practitioners would be excluded from participating altogether."

The need for the above arose out of the experience of African countries during the colonial era, that is (Barya et al 1994:41-42); their dissatisfaction with the inherited rules of colonial legal procedure and practice that were applied with remarkable rigidity and judicial conservatism (Siedman, 1969:78-79); their desire to re-create the conciliatory systems of dispute resolution that are believed to have prevailed in pre-colonial Africa and their belief in the struggle to achieve political transformation that impinges on the social, economic and cultural realities that have characterised the post-independence conditions of African society.

These struggles were perceived somewhat differently by various African States. For Mozambique it was a colonial struggle and for others like Libya, Ghana and Uganda, though it took shape in different form in each country, it was a struggle against the post colonial regime that had nurtured corruption, nepotism, the denial of human rights and general political turmoil. It was thus introduced in each case by the State itself to bring a fundamental change.

In Uganda the need for 'popular justice' was a consequence of the guerrilla experience of the NRM/NRA under Yoweri Museveni which developed alternative forms of governance and administration, including dispute resolution during its years in the bush. It was developed essentially to deal effectively with the emergence of local crises in an expeditious and democratic fashion and it proved effective in the bush (Byra et al: 1994). Consequently Museveni sought to use it to alter radically the character of the administration of justice in Uganda.

4.3.1 Popular Justice System as an executive or judicial tool ?

Welch (1991) said of the Mozambican experience with local courts that it had required substantial adaptations and modifications in the direction of reinforcing internationally

accepted procedures, values and methods of training. Consequently it was hard to assert whether it was a move to traditional forms of legal order or a reflection of the universal applicability of legal rules. The Mozambican courts have been abolished on the advice of the World Bank /IMF as being too expensive to maintain. It is however important to note that these courts made significant progress in the alteration of the abject status of women, access to land and gave the indigenous population a sense of empowerment which is ultimately the primary objective of 'popular justice'.

In Ghana, the 'Popular Tribunals' have been criticised as being an arm of the government. They are seen as interfering with the judicial system and making it incapable of being impartial and promoting justice and respect for the rule of law (Africa Watch 1992:23).

In Uganda, Barya et al (1994) found in their research that the most prevalent cases in rural Uganda, almost 90%, concern land or land related disputes especially in succession and at inheritance. As noted earlier these areas involve rules and practice of customary law and are therefore handled by the clan and RCs. Their research also found that cultural practices can and do influence the RC courts especially against the interests of women at inheritance. According to one of the several cases studied, the Chief Magistrate had this to say;

" the respondent just wanted to take advantage of the Kisoga custom (i.e. that women could never inherit land) which has outlived its usefulness and is contrary to natural justice, equity and good conscience and this court has felt it appropriate not to take judicial note of it."(Byra et al 1994:53-54).

The Government was keen to do away with these discriminatory practices and saw the law as one of the main avenues that would safe guard women's interests. The Government was however faced with the dilemma of how to implement these interests. It saw RCs as recipients and implementers of more radical ideas. As already noted,

some RCs members are clan elders who subscribe to the old customs and became obstacles instead in the adjudication of cases.

Byra et al (1994) also found that the RCs were generally ignorant of both procedural and substantive law and often exceeded their judicial powers. For instance where a party to a suit would decide to appeal against a judgement and therefore request for the "file"/records to be forwarded to a higher Court, the RC courts tended to regard it as "an insult bordering on insubordination (*to elders in the community*), rather than a right of a litigant to wish to dispute their decision "(Byra et al 1994;50) and would refuse to forward a file. Sometimes there were no records of the proceedings to be used on appeal and so the appeal if lodged before a Magistrates court especially would be sent back for a retrial. The RC courts sometimes argued that there was lack of "fees" or "costs" paid by the party appealing therefore they were unable to buy the materials to record their proceedings. Since the RC committees were not remunerated for their work, neither any money provided by the State for material for their work, the party "filing" the case or appealing was expected to foot all these costs. This was problematic especially for the person in the rural area who was generally not in gainful employment and depended on sale of crops when harvested. The 1993 Statute on Remuneration sought to remedy this.

There were also instances where suits were tried in RCIII as a court of first instance instead of going through RCI and RCII first. The higher courts would order a retrial. In terms of their relationship with the superior courts, Barya et al (1994) found that the RC courts had concurrent jurisdiction with the Magistrate's court especially in customary matters. As seen earlier, the Magistrate's courts (Magistrate's Court's Act 1964) are empowered to preside over any customary matter and so is the High Court. While there were sometimes "clashes" between Magistrates courts and the RC Courts,

the Magistrates courts generally supported the system but were of the view that they needed supervision.

Our own research found that in the rural areas, the RCs tended to regard themselves as superior to the Magistrate's court. Consequently in some instances, RCs were found to have written to Magistrate's courts demanding that cases filed in a Magistrate's court, presumably where the cause of action or the subject matter arose in the jurisdiction of the RC concerned, be returned to the RC. They were ignorant of the fact that some cases were beyond the limits of their judicial powers.

I recall in my experience as a former Stipendary Magistrate in 1987/88, that in one area within the jurisdiction of the Chief Magistrate's Court, where I served, a Grade II Magistrate was arrested from his court, tried by the RC, found guilty of corruption and subsequently 'imprisoned' at the residence of the RC chairman. He was eventually 'rescued' by the police. It appeared that the Magistrate had taken a bribe from an accused person. It was not long before he was in the hands of those (RCs) who had come to bring a "fundamental change!"

In another instance, I had gone as a Magistrate to the locality to determine whether land had been properly divided by the clan, because of a complaint. The RC1 Chairman of the locality saw my presence as interference in clan matters. He asserted that it was not within the jurisdiction of Magistrates to handle clan issues. This was the work of clan /family council. I replied that, notwithstanding, it was the duty of the court to ensure that justice prevailed in all matters. I then proceeded to enlist *his cooperation* in the matter. It was important that the clan *saw and understood* that I had not come to divide the land but to ensure that *they* divided the land equitably. If I had divided it they would probably have not respected my decision unless there was threatened use of force through imprisonment. Their attitudes reflect earlier discussions that 'law' to an

indigenous person is what they accept and recognise. It also confirms Falk Moore's (1978) argument about the futility of imposing new laws on an on going social arrangement that is self regulatory and with the power to prevent the infringement of its area of autonomy. As a judicial officer of the statutory courts which applied English procedural and substantive law, I was perceived as bringing a foreign law to regulate matters within clan jurisdiction which was already regulated by customs and practices. My *actual presence* within clan land also reinforced this perception. They needed to understand that I had not come to impose another way of regulating their social arrangements but to see that they did it fairly. This meant negotiation (Griffiths:1986) with them, in an area of jurisdiction shared by more than one regulatory regime.

In spite of their short comings in the appreciation of procedural and substantive law, the research found that the RC system was generally popular and accessible to ordinary citizens. According to sample studies (Byra et al 1994) of seven selected districts from each of the four regions of Uganda, most people felt it should continue under whatever political party that was or would be in power. It was also felt that the RCs should continue to exercise both executive and judicial functions but that the functions of the two organs should be made clear. The Report of the Constitutional Commission 1992 (ch.17:116) had found that at grass root level, the creation of different centres of authority in the name of separation of powers would most likely confuse the ordinary person. Customarily, Chiefs and clan elders exercised both executive and judicial powers as prescribed under their customs and this was understood and accepted by the ordinary person.

The euphoria that came with the move towards democracy through popular justice created a political aura around the RC courts. In the popularly acclaimed ideology of the NRM/NRA, they had been instituted to bring a fundamental new change, by

resisting negative elements and practices of former regimes still prevalent in existing organs, such as corruption in the judiciary. They were also being empowered to regulate their lives in the way known to them, not through 'elitist' or foreign ways.

The RC experience so far in Uganda confirms the observations made by Santos (1992:140) that community justice/popular justice(also legal pluralism) are embedded in the historical process of state transformation and marked by a recent past and are therefore a rupture/continuity of the previous State. As already noted the RC structure reflects the native courts set up during the colonial administration. There is also a deliberate effort by the State to ensure continuity with customary law. Its integration into the judicial system can be seen as an attempt by the State to ensure continuity or connection with the existing structure. Research so far reveal popular support and enthusiasm for the RC structure. For Uganda therefore, continuities with the past appear to encourage the emergence of popular justice but with unexpected spin-offs. Guardians of custom and culture who had hitherto seen themselves and their customary structures relegated to inferior positions in the administration of justice now see their integration into the judicial structure as creating a measure of equality with the statutory courts regardless of the limits of their powers. There is therefore an aggressive drive to enforce their norms and to limit the interference by statutory courts in their domain, thus the refusal to forward records of their judgement and their efforts to restrain appeals. Attempts to assert equality is reflected in their orders to Magistrates to forward customary cases to them and in deciding and imposing customary penalties on cases meant for the High Court, although sometimes it is done in ignorance. There is however an overwhelming support for continuance with RC and the Government has in the 1997 Statute given it greater powers. Santos (1992:140-141) points out that popular justice in the process of rupture/continuity with state legal

system manifests itself in different ways and in some cases may prove retrogressive. In India for example, the popular legal system created in Punjab ended up reproducing a coercive and unpopular nature of the state legal system and in Nicaragua prevented the emergence of popular justice. In Uganda it would appear to have a progressive role in State transformation or at least the State intends for it to do so as seen by the way its structure is being developed.

4.3.2 Significance of the RC system

Through the imposition of the RC system the State sought to use decentralisation of its executive and judicial powers to gain popular political support. Santos (1992:133) gives a word of caution here on state decentering. He argues that state-sponsored back-to-the community policies as with the RC system may actually end up with the State reproducing itself but in forms which appear as non-state political forms making the distinction between state and non state-difficult. He calls this the secondary civil society. The consequence of this is that community/popular justice and legal pluralism which are based on it may become problematic. The case of Uganda is interesting because the Government has deliberately sought to create political structures at district level and grassroot level. As already seen in the 1993 Statute, the Central Government Representative in each district represents the Head of State and the Central government and exercises political and administrative authority. All the Resistance Councils in urban areas are empowered to exercise all political and administrative authority (Section 11(1)). The 1997 Statute discussed in Chapter 10 extends this and gives all Councils legislative and executive powers (Section 10(1)) and the chairpersons of all Councils including those in rural areas the status of political head of the council (Section 25(1)). Consequently at the lowest level of the RC structure the chairperson of a Village Resistance Council is the political head of his council. An

important research would be the extent to which the State has reproduced itself and in what ways and what this means for popular justice. This is outside the ambit of our research which concentrates on the impact on various sources of dispute settlement for women with the RC judicial system playing an important role.

It is the assent by the local leaders as opinion leaders or as decision makers and that of the community of this 'system' that has given it credence in the eyes of the ordinary person and made it generally popular and effective though with the unexpected spin-offs in their relationships with the previous judicial system.

For women in the rural areas seeking justice, the RCs are conveniently within their locality so that there is no time constraint on their home activities, and no or little cost. However, with the clan or local leaders being members of the RC, this may mean that where a woman is in conflict with the clan especially at inheritance, her case may pose some difficulty because she will also be seen to be in conflict with the RCs. This is explored in more detail in Chapters 7-9. Our research findings reveal different ways in which the RCs respond to widows who are in conflict with the clan over the distribution of the estate of their deceased husbands. It reveals the extent to which they provide an enabling or constraining forum for widows to assert their rights.

4.3.3 Conclusion

The development of the legal system in Uganda during the colonial era in which laws were imposed on existing social structures for political and judicial reasons inevitably set the pace for conflict and competition (Griffiths:1986). At the onset there were attempts to respect these local order but this was subject to foreign interpretation of custom as not being 'repugnant' to standards of British morality which meant that local rules were subordinate to the imposed laws. Griffith (1986:38) pointed out that the legal organisation of the society should be compatible with its social organisation, if it

is to be accepted by the community to which it is intended to be applied. This would ensure effectiveness.

The creation of the RC system appears to bridge the gap between the imported law and the cultural system with its effectiveness felt more at grassroots because of compatibility with the Clan system. As already noted, generally in the rural areas members of the RCs are elders or leaders in their clans. Also the methods of dispute settlement of the RC and clan are similar since the Government based the RC regulatory regime on native ideology of dispute settlement. It is when the RC and clan system and the English courts are called upon by parties to a dispute to exercise their powers in areas where they all have jurisdiction as at inheritance that 'unpredictable patterns of competition and negotiation is uncovered (Griffiths :1986). In terms of law as an instrument of justice, the conflicts and competitions reveal the extent of its efficacy and limitations (Dwyer 1982:516) in the lives of those it is meant to regulate.

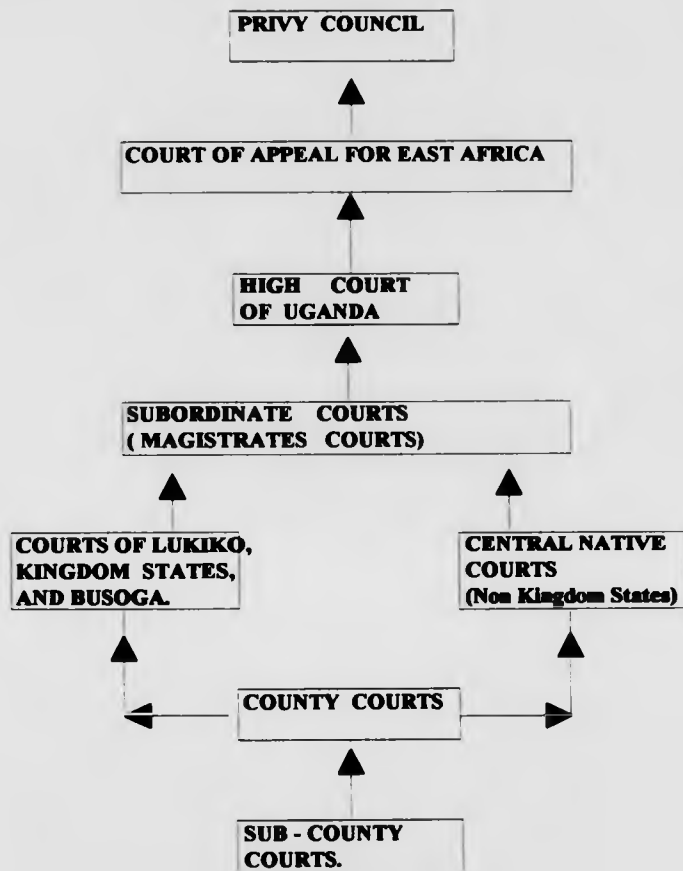


FIG. 4.1 THE JUDICIAL SYSTEM DURING THE PROTECTORATE UNTIL THE INDEPENDENCE OF UGANDA 1962

(Appellate Jurisdiction)

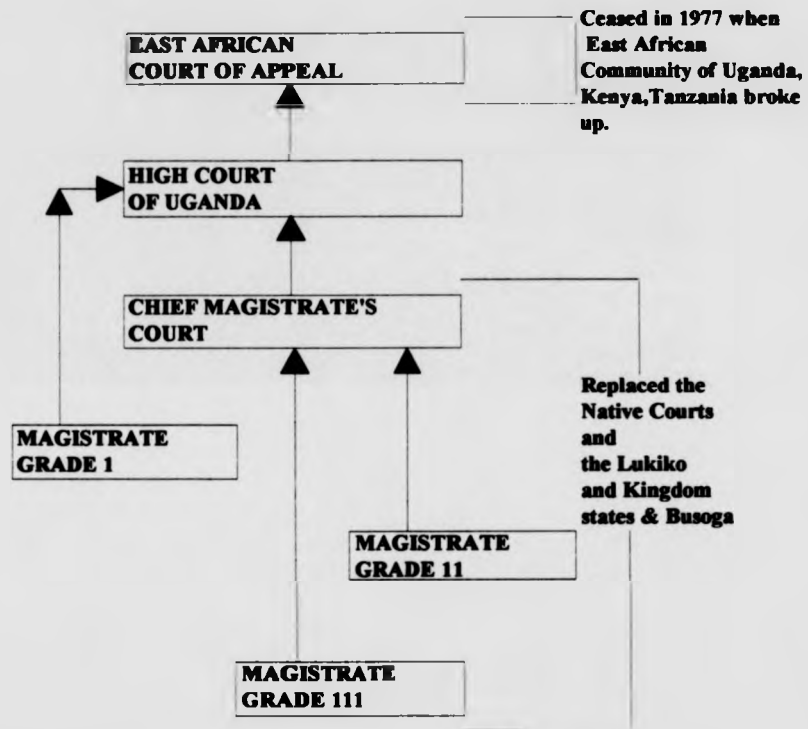


FIG. 4.2 Judicial System upto 1987

(Appellate Jurisdiction)

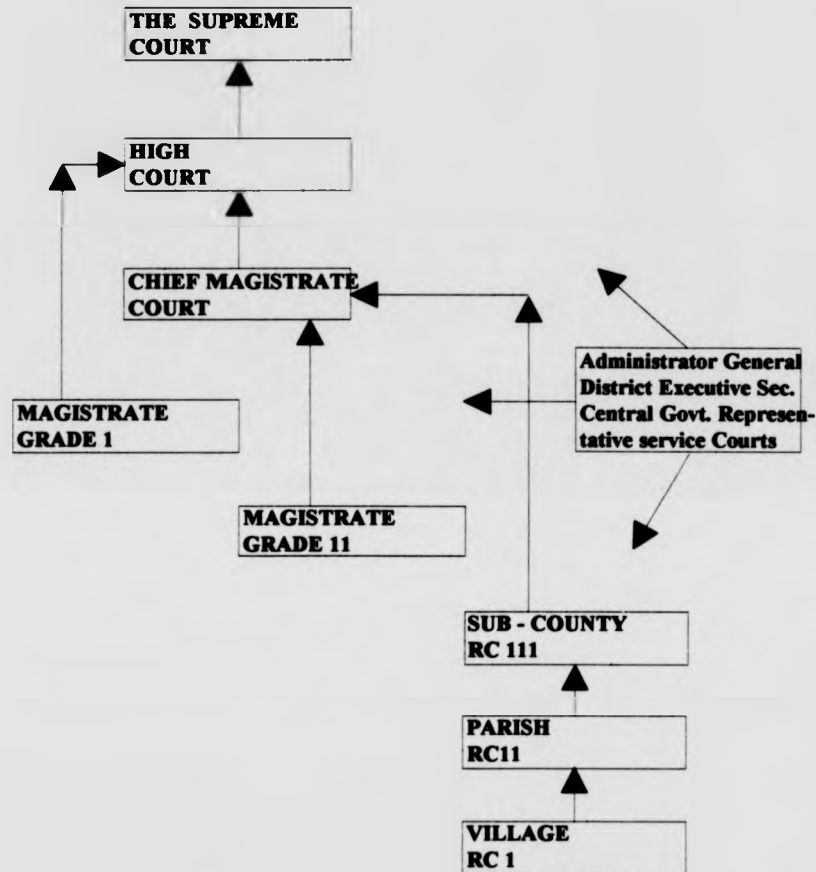
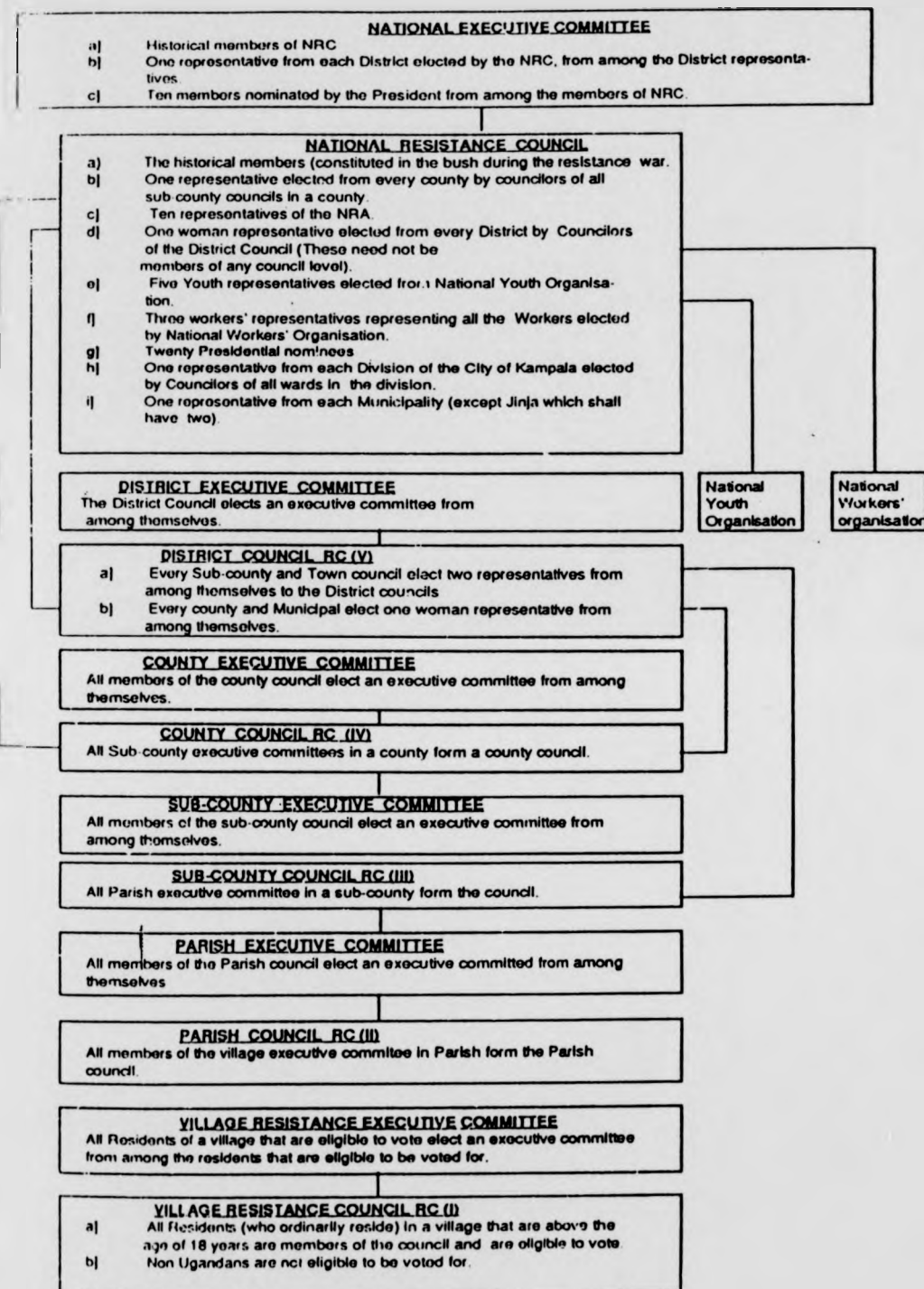


FIG. 4.3 Judicial System from 1988 - under the NRA/NRM Government)

(Appellate Jurisdiction)

THE STRUCTURE OF RESISTANCE COUNCILS AND COMMITTEES.



CHAPTER 5

KINSHIP AMONG THE BAGANDA

"It is within the family council (*clan*), which is the primary medium through which customs and practices are articulated, embellished, maintained and enforced that the significance of consanguinity becomes apparent." (Themba et al : 1995: 111)

"Men...are the most common medium through whom rights of succession to power and control of the family and inheritance of property are accomplished. Women....are often no more than peripheral beneficiaries of the succession and inheritance processes, dependent on male bounty for their continued survival and protection." (Themba et al : 1995: 108)

5.0 Introduction

This chapter reveals the centrality of the Clan system in the Baganda society. Historically, the clan held responsibility for the organisation of society. This included family relationships such as in marriage arrangements, relationships in marriage, the welfare of children and the distribution of the deceased's estate for the welfare of beneficiaries. In all these relationships it was the cohesiveness of the clan that was paramount.

The understanding of the historical organization of this society and the relationships within it is crucial to the understanding of the current relationships in marriage and inheritance practices and therefore the 'lived realities' of the women in the research.

The history reveals the place of men, women and children in Baganda society and their obligations and responsibilities. It therefore puts a woman's position within its historical context revealing how she was culturally conceptualised at marriage and widowhood. It reveals the extent to which she was able to assert herself in those circumstances. The understanding of this gives a better appreciation of the research findings in chapters 6-9 of the extent to which women have moved from their traditional and cultural socialisation to assert their rights and so determine their well being.

The clan also had a well defined customary system with a traditional appellate court system as in Figure 5.1. This traditional set up also had implications for the administration of justice during the colonial era (see Chapter 4). The colonial administrators used the already established local administrative and legal set up with their well defined local leadership to make agreements with indigenous tribes. Through this they were able to effect their policies. Also as revealed in Chapter 4, the Resistance Councils (RC) system uses traditional methods of dispute settlement with clan leaders often elected as members of the Resistance Committees. The understanding of the historical set up of the clan system and their emphasis on the role of clan elders gives a better understanding of the reason for the dominant role they play in the RC system in the rural areas.

5.1 The clan system : Origin of the clan

Roscoe (1861-1932) documents one of the most comprehensive accounts of the Baganda and their native customs and beliefs. According to him and Judge Morris (1900) who was in 'Her Majesty's High Court of Uganda' as it was known then, the Baganda were divided into about *thirty clans* or kinship divisions which in *Luganda* (the language) are called '*bika*' (plural) or '*kika*' (singular) (see lists of clans in Appendix 5.2). A *kika* (clan) was a family which traced its origin to one common ancestor (male) thus the patrilineal nature of the society. Each clan was distinguished by its two totems; a principal one by which the clan was known called a '*Muziro*' (singular) or '*Miziro*' (plural) and a secret one known as a '*Kabiro*'. The *Muziro* was usually an animal, bird, fish, insect or vegetable. It was a taboo for members of a clan to eat its principal totem. Roscoe's (1861-1932:137) documentation of the origin of the clan states that the first King of Buganda, *Kintu*, who was also believed to be the

first man on earth according to Buganda tradition, lived with his subjects by hunting for food. Animals were therefore being hunted down very quickly. With the consent of his subjects, *Kintu* made a rule that a particular animal or bird or plant should be a taboo for a particular family. This meant that it was not to be eaten by that family and it became their totem. Thus that animal, bird or plant was left to other families to hunt. Every family had a totem that was a taboo. This gave the creatures a chance to multiply. This is the story commonly referred to by the Baganda and has been passed on by oral tradition. Indeed, so strong is this belief that the practice of not eating a totem still prevails today. From childhood, a child is taught about its totem and will refrain from eating the totem throughout his or her lifetime. Also the current Education Curriculum for General Subjects for Primary Schools(Ministry of Education,Uganda) carries this story about *Kintu*, and the origin of the Baganda. Today the Baganda still have a King (*Kabaka*), named Ronald Mwenda Mutebi II.

According to Roscoe, the totemic clan system had great significance for the members of the clan. It united them for mutual assistance in the defence of their lives and property, and clan beliefs. It also regulated the social life of the community, especially at marriage and in inheritance and in property relationships. To this day, the clan system remains important in these relationships as revealed in the research findings.

5.1.1 The clan and regulation of marriage.

The clans were exogamous. No marriage was permitted between a man and woman of the same clan including where there was no blood relationship. It was taken that members of the same clan were 'related'. A person could only marry from outside his or her own clan or from another ethnic group altogether. The marriage ceremony began with a *kwanjula* to introduce the bride and groom and their clans to each other.

It was an elaborate occasion in which the two clans met in the persons of their senior members who were well versed in clan practices and ideology. This, as revealed in the findings in Chapter 6 ensured that there was no blood or clan relationship between the couple wishing to marry. The *kwanjula* was also the time when bridewealth was given for the bride. Roscoe (1861-1932:87-93) documents this ceremony in his historical findings. When a man found a girl he wanted to marry, he would inform her brother who in turn informed his paternal uncle. They would then decide on the *kwanjula*. The groom was required to bring a pot of beer which was drunk at the ceremony by the girl's uncle and brother if he was accepted. He was also required to bring bark cloth made from the bark of a tree. It was the material used as clothing by the Baganda. This was a gift for the girl and her paternal aunts. He also brought cowry-shells which was the monetary unit then. A large amount was demanded, about two thousand, which the groom paid. This sum was called the *kasimu* and was divided between the bride's parents and her paternal relatives. The parents repaid part of their cowry-shells to the groom when the marriage was consummated to help them start their home. The groom also paid another five hundred which was used to buy a goat for the wedding feast. In addition, one to ten goats or a cow, as demanded by the bride's parents and relatives, was also given. It was the clan of the bride's father that decided the amount. The groom would receive contributions from his relatives and clan members. If the negotiations were successful, the bride would immediately become his wife and he took her to his home. The groom would then give her a new hoe, a water pot, a cooking pot and a basket in which to carry food. These gifts were symbolic of her role as a married woman. In all these transactions, the bride had no say, except in indicating her consent during the negotiations when asked by her paternal aunt. The implications of

bridewealth for a woman especially the extent to which she is now able to assert herself in the marriage relationship are explored in Chapter 6.

The taking of the bridewealth by the groom and senior members of his clan to the bride's parents and near relations (clan) was symbolic. It was in effect, one clan marrying another clan. Their actions were perceived as the collective responsibility of the two clans involved in the transaction. The bride and groom were not individuals acting on their own, nor a separate entity from each of their clans, irrespective of whether they may have met earlier and agreed to marry. It was the responsibility of the clan to ensure that cultural practices were followed for the relationship to be culturally acceptable. Note that there is strong emphasis on the role of the men in the marriage transactions, a consequence of the patrilineal society.

On marriage a woman was taken to be '*lost*' to her clan because she moved into her husband's household therefore to his clan. She adopted his totem but also retained hers. This meant that she respected the rules of his clan as well as hers but she never '*belonged*' or became incorporated into his clan. She was within his clan but remained an '*outsider*.' A wife was and still is called '*mukyala*'. This word is derived from '*kukyala*', which means 'to visit'. A wife was therefore a 'visitor' or a stranger to the husband's clan. Her movement can therefore be seen more as a change in her *location* rather than in the *transformation* of her status so as to become a member of her husband's clan. Traditionally marriage did not grant her an equal status with any person in her husband's clan, not even her children, who carry the 'blood' of their father therefore of his clan.

The woman trained her children to respect both her totem and her husband's. However children were not obliged to respect their mother's totem and when they grew up, they

generally adopted their father's totem and rarely mentioned their mothers. Owing to the clan system there was no adoption of orphans. Children belonged to the clan, the father's clan. When their father or mother died they remained under the care of a paternal relative who took the place of their father. Also if a man divorced his wife she returned to her father's clan. She was not allowed to take her children with her.

Historically, marriage was the responsibility of the clan and neither a male nor a female participant could act outside these practices. A woman however appears to have been more subordinated in the marriage relationship by the cultural practices. She was expected to defer to her husband and his clan.

5.1.2 Jurisdiction of the Clan system

Each clan had its family estates which were freehold lands (*butaka*) and under the supervision of a chief (Roscoe 1861-1932:133-136). The word '*butaka*' is derived from '*taka*' (earth) and the '*mutaka*' signifies 'the man or owner of the land'. The people settled on the family estates were called *bataka* (plural). A freehold (*bataka*) was established by three or four generations of a family being buried in a particular spot of land undisturbed.

The division of the clans (Figure 5.1) was done according to these freeholds. Each clan (*kika*) could be subdivided into branches (*masiga*) or a branch (*siga*) (singular). However the subdivisions did not have different totems. Each *siga* had a piece of land for burial purposes or a village owned by their clan head known as the 'father' (*kitawe*) of the branch and is believed to be a son, grandson or near descendent of the founder of the main clan. The land or village and the internal affairs of a *siga* were respected by other *masiga* (branches).

The *Kitawe* generally presided over disputes within 'his' *siga* but where the disputes involved more than one *siga* it was sent to the chief or head of the clan (*kika*) . The Chief was also generally responsible for the conduct of the members of the branches (*masiga*) and was venerated by the whole clan.

A *siga* could also be subdivided and is known as *enda* but it rarely had separate burial grounds from the *siga*. Like the *siga*, the *enda* also had judicial powers. A member of the *enda* could appeal to the head of the *siga* if dissatisfied with a decision of the *enda*.

There was therefore a customary appellate court system as in Figure 5.1.

When the head of a subdivision (*enda*) died, the heads of the other subdivisions and that of the *siga* (branch) met together to decide on a successor who had to be a member of the same division as the deceased though not necessarily a son in direct descent. Similarly, when the head or chief of a clan died, the heads of the *masiga* (branches) met together to appoint his successor who had to be from his own *siga*.

The *Butaka* system proved useful in that the clans, divisions and subdivisions kept close ties and rallied together in case of crises, for example in death. These clan ties are still prevalent today and find their strongest means of expression in family relationships especially at marriage and inheritance as revealed in the later chapters.

The clan system clearly displays a well set up self regulating social field (Falk Moore 1978) that organises the lives of its members. Membership is gained through belonging to a clan through descent. As discussed in Chapter 4, the clan system with its well defined leadership was of political significance during the years of the British Protectorate. The administrators found a ready system of adjudication and administration. The policies of the Protectorate could therefore be effected through this clan system which reached grassroots. Their task was to win the support of these

clan leaders who then used their recognised leadership roles to win the support of their members and so helped with administration (Roscoe:1861-1932). This could also explain the thinking behind the moves of President Museveni's government to create the RC system with a similar structure. Through the support of clan leaders and other tribal leaders who are generally respected members in their communities, government policies could be disseminated to their members at grassroots and be implemented accordingly. In that way there is less interference with an already existing structure with its regulatory regime well in place. As already noted in Chapter 4, the cases the RC Committees are expected to adjudicate over such as identity of customary heirs and customary land tenure and the remedies prescribed (compensation, reconciliation and so on), reflect traditional areas and forms of dispute settlement generally dealt with by clan or local leaders. This explains the main reason for clan leaders being elected by their own people to RC Committees and consequently their overwhelming numbers and influence in rural areas (Byra et al:1994). The State had not foreseen that the clan would, in some communities, dominate the RCs. Their intention in spelling out the composition of the RC committees was to encourage the election of various categories of persons to ensure democratic participation. At the same time, their use of the traditional structure was intended as a recognition of the importance of traditional structures and the role of local leaders in their communities. Through this approach, the State was seeking to woo the traditional leaders and their communities into its way of thinking, in the light of its programme for democratic participation in the political and socio-economic development of the country. However, the creation of an avenue for appeal to the established statutory courts meant that the State saw it necessary for those who wanted to opt out of customary law, to be able to do so. It also meant that

those who did not subscribe to cultural ideas but to state ideology also had an avenue of appeal from grassroots. Statutory courts generally reflect different values and different procedures from traditional courts. These factors generated the conflicts noted by Byra et al (1994). The State was however determined to continue in this direction, and to woo the traditional communities by increasing their political and administrative powers as reflected in the amendments to the RC statutes.

5.1.3 Succession to Clan Land

In Buganda, land was vested in the *Kabaka* (king) who granted areas of land to his subjects through the supreme head of each clan. The supreme head of the clan held the ancestral land for his clan which land was divided among the branches/*masiga*. The head (*kitawe*) of each branch/*siga* held his piece of the divided land (*taka*) for members of his branch. The *kitawe* was therefore also known as the '*mutaka*'. According to Judge Carter (1900:110,116) no one could use the land without the *mutaka*'s consent. He divided the land under him between members of his branch who were collectively known as the *bataka* and who in turn only had a right of usufruct. This meant that members had exclusive right to the use of their share of the land and it could pass from father to son or relatives. However, they could not give or sell it to another clan or tribe. Likewise, the *mutaka* could not give or sell any part of the land to another clan or tribe.

As a patrilineal society, the Baganda emphasised succession along the male blood line, therefore female children or female clan members did not succeed to land. The land that was succeeded to or given continued to remain in the clan, always passing from one generation to another. *It is therefore important to keep in mind that clan land which has high priority at inheritance is the property of the clan*, though it may be

divided, 'owned' and controlled by individual members of the clan. No person can give or sell it without the acquiescence of the clan. At death, it is the clan that installs the heir who then succeeds as 'caretaker' of the land. The heir, like the rest of the clan, that is, like the men, women and children has only a right of usufruct for life. He however ensures that the land remains in the clan.

5.1.4 Women and clan land

The historical documentation clearly show that women did not succeed to land and it is very easy to interpret this, as subordination of women. We are here talking about clan land and therefore it is necessary to understand the clan set up and the concept of 'ownership' of 'clan property' as described. As observed earlier, the woman never *belonged* to her husband's clan on marriage, therefore it is logical to conclude that she could not be successor of property that belonged to another clan. Reasons generally given by the clan were their fears about clan land being transferred to another clan if a woman were successor and she married, or as a widow, remarried outside the clan. Her marriage by virtue of traditional husband-wife relationships would mean that her husband could take control of their clan property from his wife. This whole concept is located within kinship ideology which emphasises the protection of clan property for the benefit and use of present and future generations of the clan. Questions can still be raised about women and succession to land that is not clan land. The research explores the implications of this for women who had, together with their husbands, bought land outside clan land and sought to assert their rights over the land after the death of their husbands. There are instances where a woman may have made substantial improvements on the clan land and finds, that at the death of her spouse, the clan

overlooks this. The research findings show widows seeking to assert their rights to land, revealing that women's perceptions of land ownership are evolving.

5.1.5 'Inheritance' of widows

The institution of 'levirate' in which a widow is taken over on her husband's death by his male kinsman was also found among the Baganda. According to Carter (1900:117-119) and Roscoe (1863-1932:117-123) there were a number of ceremonies before, during and after the burial of the deceased husband in which his surviving widows were given, by the clan leaders, to his male relatives as wives or concubines. Polygyny was a common practice among the Baganda, as indeed among the other patrilineal tribes in Uganda consequently the number of widows surviving the deceased (The Kalema Report:1975).

According to their findings, the ceremony before the burial was performed strictly by the deceased's eldest son. All the widows of the deceased assembled by his body before his burial and one of his relatives placed pumpkin seeds in his hands. The eldest son of the deceased would then remove the pumpkin seeds from the deceased's hand with his mouth, chew and blow them over one of the childless widows of his father. This widow immediately became his wife. The son performing this was called the '*muluma mpambo*' (*the eater of the seed from the palm of the hand*). The picking of the seed from the deceased's hands could be interpreted as the deceased giving his wife to his eldest son. There appears to be no clear reason why the eldest son took a childless wife but presumably it ensured that father and son did not have children by the same woman. This was all that the eldest son obtained from his deceased father. He never inherited any of his father's property. He however became one of the guardians of the children of the deceased and looked after their interests.

The burial ceremony was performed by a grandson of the deceased. He got into the grave and cut a piece of the bark cloth in which the deceased's body was wrapped, and according to Roscoe, threw the knife (*presumably not directly*), at one of the remaining childless widows of the deceased. She became his wife and immediately went home with him. Among some clans if there was no grandson, a grand daughter performed the ceremony and the deceased's widow became her servant.

These two ceremonies were followed by a mourning period of some days. During this time, the heir known as *omusika*, was appointed and installed by the deceased's clan. The heir was generally one of the sons of the deceased, or where there was none, a male relative of the deceased. One of the remaining widows of the deceased would be given to him as wife. A few of the widows who had children were chosen to tend the deceased's grave for life. Others were given to male members of the deceased clan as wives. The rest remained with the heir as his concubines. Members of the deceased clan who were given his surviving widows were often married men but unmarried men who were found fit by the clan to have a wife were also given. The 'distribution' of the widows depended on the number the deceased had. Generally however, emphasis was on giving the heir *omusika* who was *heir to the blood line and consequently to the deceased's status*, one of the widows or the sole widow in order to continue the family line. There was also emphasis on guarding against losing widows of the deceased to other clans consequently their distribution to his male clan members.

If any of the widows wanted to remarry outside the deceased's clan (usually one who had no children), her brother had to first settle the matter with the deceased's clan and to repay the full bridewealth which the deceased gave to her relatives during the *kwanjula*. When this was done, it was a symbol of the widow *re-entering* her clan as

well as *releasing* herself from obligations in her deceased husband's clan. If a widow merely wanted to return to her clan because she did not wish to live with the heir, she was allowed to do so, on the understanding that the clan returned the equivalent of the original bridewealth sent. The bridewealth was generally demanded because it was the wealth of the deceased's clan given to release her from obligations and responsibilities under her clan to take up those in his clan. Her wish to go ended the responsibilities in the deceased's clan and therefore necessitated the return of the items that had bound her to his clan. Generally however, where there were children and they remained in the deceased's family, the bridewealth was not returned in full. A similar practice can also be found among the Basotho of Lesotho (WLSA:Lesotho:1994:146-151). If a widow remarried and there were no children or she took them away, her parents were obliged to return the 'bohali'/bridewealth. If however the children remained with her deceased husbands family then it was not returned. Generally, the practice of return of bridewealth is common among many tribes in Africa especially in divorce or where the wife decides to return permanently to her family. For example, the study of Kenya Customary Law (Cotran:1987:123) reveals that all the customary laws provide that if there are no children of the marriage the bridewealth is returnable in full in divorce or where the wife wanted to return to her clan. There are some exceptions, as for example, with the Luhya tribe where a father of the wife may keep one or two heads of cattle. Where there are children, bridewealth is returned if the wife took the children with her. Generally none was returned if they remained with their father (Cotran: 1987:121-184).

Although Roscoe (1863-1932) interpreted the traditional practices concerning widows as objectifying her, it is clear from the historical account that this does not appear to be

the intended practice of the culture. The practice was informed by kinship ideology which sought to ensure the *welfare of widows*. It is also clear that *she had a choice* which she could exercise with the support of her clan especially where she wanted to leave the deceased's clan in which case part or the whole of the bridewealth had to be returned depending on whether there were children. As the clan was of one stock and clan members often rallied to the assistance of their 'brothers' and 'sisters,' it is most probable that the widow's bridewealth was replaced through these strong kinship ties. Widows who remained in the deceased's home *consented* for various reasons. Naturally, there were those who were too old to remarry, or those who had older children to care for them, or those who did not want to burden the clan with returning the bridewealth. There were also those who wanted to stay and bring up their children in the husband's clan, while enjoying the benefit of the property they already had through the marriage. Lastly there were those who were not reluctant to be under the care and protection of a member of the deceased's clan as 'wife.' Once again the collective responsibility of the clan is reflected in these relationships.

5.1.6 Division of property of the deceased

According to Roscoe (1861-1932) and Judge Carter (1900) the heir/*omusika* who was heir to blood line inherited the deceased's land. Through the heir, land remained in the clan. He also took possession of the main house that the deceased lived in. The widows given him continued to live in the separate houses they lived in before the deceased's death, thus enjoying the benefit of the property they had before. It is probable that the heir must have received the lion's share of the deceased's estate in order to care for the children and widows of the deceased. He also took care of the obligations of the deceased such as his debts. The heir would also have had a moral

duty to provide for his near relatives like the deceased's parents and those who were dependent on him before he died. All the children of the deceased were also known as 'the children of the heir' because he had, as it were, stepped into the deceased's shoes. The appointment of an heir was therefore crucial to the clan. They were also protective of clan property which were mainly the land and the house(s). The authors do not make distinctions about *individually owned property* of the deceased and who the individual 'heirs' of it are. The *omusika* is however heir to the deceased's 'status' thus the *omusika* acquires his widow or widows, his residential house and land. The research findings in chapters 7-9 elaborate further on the distribution of property and the appointment of the heir revealing that sometimes the deceased would have indicated his wish to give some of his personally owned property to his children or near relatives or indicated whom he wanted as heir. This would be respected by the clan if *they* as guardians of clan property agreed with it.

As noted in Chapter 4, during the Protectorate, the colonial administrators found strong clan or tribal systems in existence. Consequently, the Statutory courts established during that time endorsed the customs and cultural practices of the indigenous peoples, as long as they were recognised by the people to whom they applied and were not contrary to natural justice and morality. In the case of the Baganda the courts stated the position regarding the distribution of the deceased's property. In Kajubi v Kabali (1944), the clan head had distributed the estates of a deceased man of Buganda origin. One of the beneficiaries who was discontented with the distribution took the matter to court. Sir Joseph Sheridan said ;

"In my opinion neither the High Court nor this Court (of Appeal) has any authority to interfere with the distribution effected by the clan head." (pg 34)

Sir Joseph Sheridan found it necessary to uphold the decision of the clan in matters that were pertinent to their way of life. He took cognisance of the Baganda custom where on intestacy the head of the clan exercised a special power of appointment to name the heir (*omusika*) and to distribute the estate among the children.

Also in the case of Musoke and others v The Head of the Nsenene Clan and another (1950) N.S.D. 35 Ainley J. held that ;

"...the choice of a successor to a deceased intestate is to my mind a matter which is not within the jurisdiction either of the Principal Court or of this court and is the sole concern of the clans and of H.H(His Highness) Kabaka (*King*) (of Buganda)."

The cases of Kajubi and Musoke firmly established that the choice of an heir/successor in intestate succession was the responsibility of the clan in Buganda. Our research reveals the current thinking of the court on the role of the clan in the choice of an heir and in the distribution of property of the deceased especially in the light of the RC system at grassroots. The research also pays particular attention to the extent to which a widow can assert her rights to land and property in these circumstances. It also discusses the place of law in the implementation of the division of a deceased's estate.

In these relationships and transactions discussed, it was the values of the clan that were respected. Everything was done in the interests of the clan and with individuals obliged to fulfill certain specific roles, duties and obligations which were intended to be and perceived as beneficial to all. A woman's position in the society, like that of the heir and all members of the clan was bound up with that of the clan, and in her case bound up with her husband's clan where she was married or with her father's clan where she was not.

The following Chapters 6-9 reveal the significance of this background in the lived realities of the women in Buganda and the extent to which there are changing

perceptions of roles and responsibilities. Subsequent chapters explore women's perceptions of themselves and the extent to which they assert themselves and the methods they use to fulfill their goals.

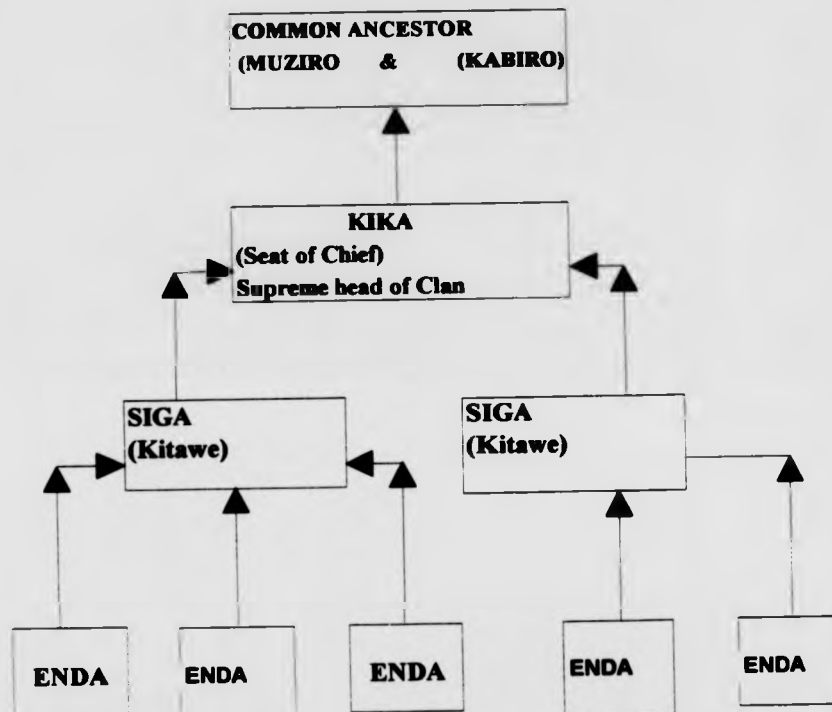


FIG. 5. 1 Hierachy of customary (legal) powers of the Clan

List of clans with their totems

Roscoe(1861-93 :138-140) gives a very comprehensive and according to historians best known documented list of the clans of the Baganda and their origin.

1. The Leopard clan (Ngo) had the Genet (Kasimba)for its second totem.
2. The Lion (Mpologoma) clan had the Eagle (Mpungu) for its second totem.
3. The Colobus Monkey (Ngeye) clan had a small monkey (Munyungu)
for its second totem.
4. The Otter (Ngonge) clan had the Genet (Kasimba) for its second totem.
5. The Grasshopper (Nsenene) clan had for its second totem a kind of locust
(Nabangogo), which lives and feeds upon the young shoots of the plantain.
6. The Civet Cat (Fumbe) clan had the Frog (Kikerekere) for its second totem.
7. The Elephant (Njovu) clan had the Hippotamus (Nvubu) for its second totem.
8. The Lung-fish (Mamba) clan; second totem a small fish (Muguya).
9. The Lung- fish (Mamba) clan ; second totem a fish (katumba);
most people however affirm that the second totem was the Frog (Kikerekere).
10. The Mushroom (Butiko) clan ; second totem the Snail (Nsonko).
11. The Manis or Pangolia(Lugave) clan ; second totem the Mushroom(Butiko).
12. The Sheep (Ndiga) clan ; second totem the Lion (Mpologoma).
13. The Buffalo (Mbogo) clan; second totem a New Cooking- Pot (Ntamu).
14. The Small Grey Monkey (Nkima) clan; second totem the Entrails of Animals (Byenda).
15. The Oribi Antelope (Mpewo) clan ; second totem the Grey Rat (Kayози).
16. the Katinvuma clan, *katinvuma* being a small seed of a shrub,
originally used for beads; second totem all kinds of Beads.
17. The Bird (Nyonyi) clan; second totem another bird (Kunguvu).
18. The Edible Rat (Musu) clan; second clan another rat(Muyoza).
19. The Yam (Kobe) clan ;second totem another kind of yam (Kama).
20. The Bean (Mpindi) clan ;second totem a wild bean (Kindira).
21. The Bush buck(Ngabi) clan ; second totem a kind of grass (Jerengese).
22. The Dog (Mbwa) clan ; second totem the Iron Bell, used to fasten on
the dog when hunting.

23. The Jackal (Kibe) clan ; second totem the Puff Adder (Mpiri).
24. The Cephalopus, a small antelope (Ntalaganya) clan
second totem the Tree Fungus (Malere).
25. The Roebuck (Njaza) clan ; second totem an antelope (Njugulu).
26. The Hippopotamus (Nvubu) clan ; second totem the tortoise (Nfudu).
27. The Genet (Kasimba) clan ; second totem a locust.(Janzi).
28. The Heart (Mutima) clan ; second totem the Lungs.(Maugwe).
29. The Tailless Cow (Nte teriko mukiyo) clan ; second totem the Crested Crane (Ngali).
30. The Spotted Cow (Ente ya Lubombwe) clan ; second totem unknown.
31. the Hornbill (Nganga) clan ; second totem unknown.
32. The Rain Water (Mazi) clan ; second totem unknown.
33. The Crow (Namungona) clan ; second totem Heart of Animals.
34. The Grass (Kitete) clan ; second totem unknown.
35. The Crested crane (Ngali) clan ; second totemn unknown.
36. The Red Ant (Kinyomo) clan ; second totem unknown.

The following clans have joined themselves to others : -

The Katinvuma clan has joined the Mushroom clan.

The Bushbuck clan has joined the Monkey (Nkima) clan.

The Dog clan has joined the Civet Cat clan.

The Jackal clan has joined the Otter clan.

The Rainwater clan has joined the Lion clan.

The Crow clan has joined the Otter clan

Some of these have become incorporated in the clans which they have joined
and have lost their identity.

CHAPTER 6

BRIDEWEALTH AND THE CONSTRUCTION OF WOMEN.

"If women themselves may act as wealth, then what persons are they representing?.....When women as sisters and wives sharing substance or identity of interest with men, move between clans, we may argue that it is part of themselves that men are exchanging..... Clan groups that share a common substance thus see themselves as linked to one another through the marriages of women. Women are 'roads' for exchanges, and elaborate group presentations follow the pattern of marital alliances. (Strathern 1984:167-168)"

6.0 Introduction

Having examined the roots of the Baganda kinship system and its construction of a woman in Chapter 5, this present chapter explores the current cultural construction of a Muganda woman. It begins with the *kwanjula*, that is, the introduction ceremony where bridewealth or marriage gifts are given and the marriage relationship cemented. Secondly, it explores the consequence of the *kwanjula* on her marriage relationship and relationships to property within marriage. The purpose of this exercise is to position her within the cultural context where on entry into marriage, 'images' of herself are formed through societal attitudes and her self perception. These images then affect the extent to which she can assert herself in the marriage. The aim is to discover the impact of these images, formed at the beginning and within a marriage relationship on the subsequent change in her status on widowhood. Chapters 7-9 reveal the extent to which she, as a widow, is able to rise above the images formed by society and herself perception at marriage. While it is clearly the case that marriage has an impact on men's perceptions of themselves, the findings on bridewealth purposely concentrate on the bride's experience because of her subsequent experience of widowhood.

The findings in this chapter are drawn and collated from semi-structured interviews with 13 middle class women from Kampala city, an urban area (see Figure 6.1 for

their profile), a focus group discussion with 24 women from Rakai district, a rural setting (see Figure 7.2 for a profile of a selected representative of 20 widows), and a focus group discussion with 12 men from Rakai, making a total of 49 persons. All the persons interviewed belonged to the Baganda tribe.

The women were selected from an urban and rural setting to allow for the specificity of their local cultural context. In Uganda where 89% of the population are rural and the rest are urban, reference is generally made to the rural poor and mostly 'uneducated' class meaning lacking formal education and the urban educated meaning possessing formal education. The findings as indicated in the profile of the women reveal that the rural 'uneducated' have had very basic formal education mostly stopping at primary school level whereas the urban women range from primary to University training. The study sought to determine whether there were differences in their perceptions of the bridewealth practice as a result of their background. It also sought to discover whether different consequences flow from the marriage ceremony and property relationships as a result of their *rural/urban location*.

6.1 The Kwanjula.

According to the findings, at the *kwanjula*, the bride introduces the groom who wishes to marry her to her father and relatives and her clan. The groom is generally accompanied by his relatives and clan members and he brings gifts or what is seen as bridewealth to the bride's family.

Cavina, a 60 year old woman and an elder in the community, who was interviewed in the research, described the contemporary *kwanjula*;

" The *kwanjula* is very important. When a girl finds a man who wants to marry her, her parents and relatives/clan may not know him or may have very little knowledge of him. Consequently she needs to introduce him to them, that is to *kwanjula*. It is uncommon for a man to *okwanjula* (that is, to introduce) his wife to be. The *kwanjula* is therefore the first step

the couple make before getting married. This ensures that both their parents get to know each and guards against the girl and man marrying from the same clan, something which is a taboo in the Baganda culture."

6.1.1 Gifts to the bride's family

The findings reveal that there are generally traditional gifts which the groom is expected to give to the bride and to some culturally important individual members of her family. The amount given generally depends on the financial status of the groom or the demands of the bride's family or both. The groom is usually assisted by his relatives and clan members and friends to obtain the gifts. The gifts are as follows;

- (a) to the bride's father and the eldest brother, a *kanzu* (traditional male attire for important, ceremonial occasions). It is a long white robe to feet level, worn over a pair of trousers);
- (b) to the mother and *ssenga*/aunty (father's sister), a *busuuti/gomesi* (long traditional female attire);
- (c) to the bride, a *busuuti* and other items such as shoes, handbag and suitcase and whatever else the groom wishes to give her.

The gifts to the bride are *symbolic* of the groom's ability to meet her personal needs and provide for her and in modern times also a visible expression of his love for her. He may also give her an engagement ring when the *kwanjula* is successfully concluded but this is not common among the rural community. Several *kibbo* (traditional baskets used especially for food stuffs) of meat of cattle or goat and sugar and salt, symbolic of basic food in the home, and *kassuze katya* (some customary items) are also given to the bride's family and relatives.

6.1.2 The marriage transaction.

According to the research findings, before the marriage negotiations begin 'envelope with money and referred to as *ebassa* (envelope) or *ebbaluwa* (letter) is given to the bride's family by the groom. As seen in Chapter 5, traditionally, cowry-shells were the monetary unit. The amount the groom gives is expected to be generous. This gives him the locus standi to ask for the hand of the bride. It is said to 'open' the negotiations. The family of the bride generally decide on the amount to be given during the negotiations, that is, to '*okusala omutwalo*.' In the 1960s the maximum *omutwalo* was about 10,000 (ten thousand) Uganda shillings. This amount would have been sufficient to build a house. Currently in the 1990s it is equivalent to about \$10(US dollars at the exchange rate of \$1.00 (one) to 1,000 (one thousand) Uganda shillings which can only buy two chickens. Although the bride's family still ask for *omutwalo*, the terminology is constructed as meaning a 'reasonable' amount of money in the light of prevailing socio-economic conditions and the status of the groom. This can mean anything from between 50,000 Uganda shillings for the rural 'poor' man to 1,000,000 (one million) shillings (\$1,000 US) for the urban 'elite'. The per capita at the time of the research was estimated at \$170(US). However, most families are interested in the *omutwalo* being given as *akasiimo*, that is, an amount *expressing* or *symbolic* of *appreciation* to the parents, for the *upbringing* of their daughter. The discretion in those circumstances is on the groom's family to give what they consider reasonable. It must however, be acceptable to the bride's family.

The *ebbassa* (envelope) generally consists of three envelopes. One is given to the paternal aunt (*ebbaluwa ya senga-* envelope for aunty), another is to the brother of the

bride (*ebbaluwa ya muko* -envelope for brother-in law), both of whom accept it on behalf of the family. The bride receives the third envelope (*ebbaluwa y'omuwalla* - envelope for the girl). Hers however symbolises the groom's love for her. Cavina, elaborated on the importance of the *omutwalo*;

"Before the two parties (families) agree on the '*omutwalo*' to be paid, both sides will bargain (*okuvuganya*). Sometimes they will reach a deadlock (*okulemagana*) and adjourn to another day to continue with the bargaining. Sometimes the parties will not reach an agreement and the groom's side will demand for the return of any gift they have given so far including the ceremonial pot of beer which is symbolic of opening the talks, and generally brought by them to be drunk with the bride's negotiating party."

The men's focus group in Rakai had this to say about the *omutwalo*;

"Some parents demand a lot because they do not want the man, so they hope he will be unable to pay and therefore not marry their daughter"

According to these men, the bride's family may not be keen on her choice of groom. Instead of openly expressing this, they will demand exorbitant sums of money, making it difficult for him to fulfil the obligation and consequently not marry their daughter. The extent to which this happens was not pursued in the research as this was outside the main focus of the inquiry. However from the experiences of the women interviewed, the bride would normally have had a good feedback from the *ssenga* (paternal aunt) about her family's and near relatives' opinion of the man she wishes to marry and of his family too and what to expect before the *kwanjula*. The bride would then communicate this to the groom.

6.1.3 The role of the *Ssenga*/paternal aunt at the *Kwanjula*

The *ssenga* plays a very major role. According to the findings, if she does not accept the *ebbassa*, then she is indicating on behalf of the bride's family that they are not content with the amount given or they are not pleased with the groom or they do not want him. She is traditionally the person who teaches the bride about sexual

relationships between the bride and her husband. The *Ssenga* also teaches her to respect the groom and his clan and to be a good wife. At the *kwanjula*, the *ssenga* introduces the groom (on behalf of the bride) to the bride's family. The bride appears at the beginning of the ceremony accompanied by her friends, to be introduced to the groom's family and to greet them. For the rest of the negotiations, she sits in another room or place with other women who would mostly be her friends and some relatives. The bride is never a direct party to the negotiations immediately taking place. She carries the image of a respectful, submissive woman and is expected to remain silent throughout the ceremony. If however for some reason during the negotiations the occasion is called for, perhaps where there is some disagreement which would affect her, the *ssenga* will consult her before putting the case before both parties. Usually, the bride would have discussed all her wishes with the *ssenga* before the *kwanjula* so that further consultation during the ceremony is rarely necessary. Thus, she express her wishes indirectly through the *ssenga* or in the alternative, her brother, though the latter is less common.

There is generally a written agreement (*endaganno*) between the two families. Once the ceremony is completed successfully, the bride and the groom are considered engaged and married and there is a lot of feasting. Culturally they can begin to live as husband and wife. Among practising Christians and Muslims it is considered an engagement and is subsequently followed either in the same week or thereafter by a religious wedding ceremony.

6.1.4 Significance of the *Kwanjula*

According to Cavina, a woman who does not *kwanjula* is regarded as having "*okwefumbiza*" that is, married her self (without her parent's consent) something

which was culturally unacceptable. The man who takes a woman without the *kwanjula* is regarded as "*sewamoko*," that is, "the man who gave nothing." He was not respected nor accepted as a 'husband' by society, especially by the woman's clan. The effect of this on the married status of the couple is best illustrated by Respondent 2 (Appendix 6.1). She is a University graduate and married to a practising lawyer. They were married in the District Commissioner's office, one of the legally recognised forums of marriage in Uganda (The Marriage Act Cap 211). She said ;

"My parents and relatives are demanding for both a traditional (*kwanjula*) and a church ceremony. I have to keep reminding my husband that as far as my parents and relatives are concerned they do not recognise this marriage. We still have to do the *kwanjula* ceremony since we *only went* to the District Commissioners's office to be married.

In the eyes of the clan the *kwanjula* gives *cultural validity* to the marriage. It should therefore be celebrated traditionally and according to the culture practices of the bride not of the groom. This is also recognised by law as laid down by Justice Kakooza in the case of *Ajiya v Ajiya* (1967) discussed further on. Any religious ceremony that follows afterwards would be due to the religious convictions of the families or the bride and groom. Religious leaders are also known to ask a couple before they wed whether they have had the *kwanjula*.

6.1.5 The current legal definition of a married woman.

The validity of a subsisting marriage determines a woman's right to matrimonial property at the death of her spouse. Consequently courts have often had to determine who a 'married woman' is according to the laws of Uganda. Dealing with a case of adultery (*Ali v Uganda* (1967) EA 596), under the Penal code Act of Uganda, the then Chief Justice, Sir Udo Udoma, had to determine the meaning given to 'married woman.' He said ;

"any married woman" in section 150A of the Penal Code must mean any woman who is married to any man irrespective of the form of such marriage. The most important point to note is that such a marriage must have been conducted in *any form of marriage recognised* by the people of Uganda *including marriage according to the custom of the people*. The phrase married woman is a term of art which confers on any woman a specialised status in society as distinct from an 'unmarried woman.' (italics mine)

Sir Udo Udoma went on to point out that all marriages prescribed in statute and also "marriage contracted under or in accordance with customary law are recognized by the law of Uganda." Below are the current laws that govern marriage in Uganda ;

- (a) The Marriage Act (1964) Chapter(Cap) 211 of the Laws of Uganda governs Christian marriage in church, marriage in the Registrar's office (court), and in the District Commissioner's office in the district in which the marriage is performed. This marriage is regarded as monogamous. It does not require the fulfilment of a customary marriage practice as for example the *kwanjula*.
- (b) The Marriage of Africans Act (1964) Cap 212 governs marriages celebrated between Africans both of whom profess the Christian or Mohammedan (Muslim) religion (Section 2 of the Act). It is to be celebrated by a minister of the religion to which the parties belong. However customary formalities, for example, the *kwanjula*, required in the custom of the parties to be married, has to be fulfilled. This marriage, if celebrated by Muslims, would make it polygynous by virtue of their religious teaching on marriage in the Koran which permits a man to have more than one wife in certain circumstances. However, if the parties married in church, it would be regarded as monogamous by virtue of Christian teachings on marriage.
- (c) The Marriage and Divorce of Mohammedans Act (1964) Cap 213 governs all those who profess the Muslim religion, that is Africans and non- Africans and is celebrated according to Muslim rites.

(d) The Hindu Marriage and Divorce Act (1964) Cap.214 governs Hindus and is celebrated according to their teachings.

The introduction of the Mohammedan and Hindu laws were a consequence of the presence of Asian Muslims and Hindus who were brought from India by the British rulers during the Protectorate to help build the East African Railway of Uganda, Kenya, and Tanganyika (as it was known then).

(e) The Customary Marriage (Registration) Decree, (Decree No.16 of 1973) governs marriages celebrated by any parties according to customary practices only. It is the most common form of marriage especially among the rural population. Before this Decree, registration of a customary marriage was not necessary. This law now requires that a customary marriage be registered. In rural areas this can be done before a chief. The registration is for administrative purposes and non registration does not invalidate the marriage. This marriage is potentially polygynous because customary marriages among the ethnic tribes in Uganda permit a man to have more than one wife.

The validity of a customary marriage rests on the fulfilling of the particular requirement of the bride's tribe in the giving of bridewealth. Some of these requirements were provided in statute for particular tribes as for example, (a) The Bugisu Bride-price law Legal Notice No. 176 of 1960, (b) The Bukedi Bride-price law Legal Notice No. 259 of 1950. The court has also laid down guiding principles. In the case of Aiiva v Aiiva (Uganda High Court) Divorce Jurisdiction of Uganda, 1973. Justice Kakooza dealt with the payment of bridewealth in customary marriages. In this case, the petitioner sought a dissolution of her subsisting marriage, to marry another man. She contended that her husband had only effected part-payment of the bridewealth which fell short of the requirement of the practices of her community, therefore she was not his wife. The

father of the petitioner stated that, although the man had only effected part-payment, they had accepted the bridewealth. The court held that non-payment of bride price does not affect the validity of a marriage provided the practices and rites of the community concerned do not regard bridewealth as a determining factor to establish the validity of the marriage, or where the requirement of bridewealth had been fully or partly waived by the parents of the woman. In Aiiya's case the parents had waived part of it therefore there was a valid marriage. The parents of Respondent 13 in our research (Appendix 6.1) waived all the bridewealth. She said this of her kwanjula ;

"My father was a Chief. When my husband's family brought a goat as a gift, he refused to take it. He said he only wanted to see his daughter get married. He did not ask for anything. The people in the village were extremely surprised that he had made no demands on the man who was to marry me as it was unheard of for a father not to ask for gifts from the man."

Respondent 12 (Appendix 6.1) also said that her parents did not ask for anything so nothing was given at the kwanjula and it did not affect her subsequent relationship with her husband and in-laws. Customary law and statutory law consider these marriages valid. Respondent 12 however added a word of caution. She said if nothing is given and a misunderstanding should arise between the bride and her husband, the society, her in-laws and her husband would say that she had behaved badly and that was why her parents did not ask for anything for the *kwanjula*!

Where a man does not fulfil the requirements as decided by the parents and they continue to live as 'husband' and 'wife' there are some far reaching consequences. For example, in the case of Uganda v Eduku (1975) High Court Bench 359 the respondent (accused person) was charged with adultery contrary to Section 150 of the Penal code. The complainant alleged that the accused had committed adultery with his wife whom he had married customarily. The father of the woman told the court that the complainant had never paid the full bridewealth as required by their custom. They did

not consider her his wife although she had been living with the complainant as husband and wife. The court held that the woman could not qualify as a wife as payment of the full bridewealth, which was an essential requirement of a valid marriage in the woman's community, had not been fully paid to the parents, consequently there was no adultery.

As shown by the various statutes, a couple can choose to marry under any recognised form of marriage other than customary law. By implication they have opted out of any aspect of their relationship, for example, divorce and inheritance being governed by customary law. In practice however, the families of the bride generally insist on the groom fulfilling the 'customary obligation' of giving bridewealth before marrying under any other law. Where bridewealth is not given the family of the bride may not recognise the couple as being properly married irrespective of their marriage under any other recognised forms of marriage. The impact of non payment of bridewealth is reflected in the concern of Respondent 2 who is legally married under a recognised law but finds that in her daily lived reality especially within her cultural context, she is perceived as not being a married woman. This may also cause difficulties at death. The families of the deceased husband may try to stop her from benefiting from his estate unless she goes to court. These anomalies in the law have led to a call for a unified family law.

In our subsequent discussion of Nabakooza's case, we examine the interpretation given to her 'married' status by the family of the deceased whom she claimed was her husband. The research also examines the interpretation given by the RC, the DES and the Court and the implications of this for her rights to the property of the deceased.

6.1.6 Purpose of Bridewealth

The interviews with the 49 women and men reveal a variety of opinions about the purpose of the bridewealth. More significantly they reveal how a woman is currently *culturally constructed* by society and how she perceives herself as a consequence of bridewealth practice.

(a) Consensual Perceptions

Below are perceptions that were generally agreed upon by both male and female persons interviewed.

Appreciation: bridewealth is a form of appreciation to the parents for the upbringing of the bride. It therefore honours the parents. It is also an appreciation by the groom's side for being allowed to come and ask for the hand of the bride.

Security: it is security for the marriage, giving it a strong foundation. The gifts cement the relationship between the two families and therefore the two clans. This provides the foundation for the marriage relationship of the couple. Cavina refers to this as *okugata amaka*. It is also an assurance to the bride's family that the man is sincere and wants to marry her.

Status: it is an indication of the status of the man. The quality and quantity he gives, reflects his family background and therefore the kind of home the bride will be going into. It indicates the man's ability to care for his wife. Consequently, it reassures the bride's parents of their daughter's welfare.

Consideration: it is a form of consideration for the loss of services of the bride to her family. Culturally, daughters do most of the domestic chores. In the rural areas

especially, they fetch water from wells or streams and also firewood. They cultivate, cook, clean and look after the younger family members.

Value: bridewealth is symbolic of the 'value' of the bride. Having a family would give her a background and respect. The more influential the family and the more highly educated the bride, the more her value, in terms of social status. Traditionally the amount given also indicated that the woman was a virgin or was virtuous but in modern times it is not always the case although virginity and virtue is still valued.

(b) Variations in perceptions

The rural women interviewed argued very strongly that the giving of bridewealth was the selling and buying of the bride because of the nature of the transactions which involved bargaining, money and a written agreement. The urban women however saw it as a cultural requirement for a marriage. The men interviewed on the other hand said that if no gift was given neither the woman nor her family would respect the man and the woman could easily walk out on him, that is, abandon the marriage as and when she pleased, a fact confirmed in the statement of Namuddu, one of the rural women in the focus group. Her story is narrated further on. The men also said it gave a man 'ownership' of the woman, that is, he had culturally recognised rights over her. In that way she 'belonged' to her husband. To them this gave her a respectful status, a status located in being his wife. Both the men and the women were however agreed that the practice of giving bridewealth should not be abolished. According to both the rural and urban women;

"It should not be abolished but the gift should be decided by the groom and it should be given to the parents of the bride in appreciation for the upbringing of their daughter. If it is abolished men will consider women worthless and will mistreat them."

According to the men,

"It should be a gift in the form of an appreciation because of the upbringing of the girl by the parents. The parents need to be appreciated. But the gift should be decided by the man who gives it."

6.1.7 Consequences for the Bride: construction of a Wife

The women interviewed gave their opinion on the consequence of the giving of the bridewealth on their marriage relationships. There was quite a marked difference between the urban and the rural women. The urban women asserted that it did not make them feel subordinated in the marriage relationship nor were they treated likewise in their experiences. The responses of the urban women were consistent. However the extent to which they controlled their lives in the marriage relationship varied. This issue is discussed towards the end of this chapter in the women's words and compared to that of the rural women. However the present discussion concentrates on the experiences and perceptions of the rural women for whom the consequence of bridewealth appears to have far reaching consequences on their ability to control their lives during marriage and at the death of a husband.

6.1.8 Consequences for rural women

One of the members of the group of the rural women interviewed, an elderly woman in her sixties, Namuddu, told her story which sums up the consequence of bridewealth practice in marriage according to the perception of the rural women. She narrated her experience ;

"After we had been married for some years, my husband brought another woman and whenever I complained he would say I was his property. He had bought me. I had no say. I decided to leave him. I returned to my parent's home and was given a plot of land by my father, where I built a small hut and survived through cultivation and brewing beer. One day, two years later, my husband turned up suddenly (we were never divorced). I had brewed beer and was going to sell it. He came straight to my hut and ordered me to go immediately with him. He was taking me back. I tried to plead with him to let me sell the beer, at least, to get money. He refused and ordered me to go with him. I was still his wife and in any case bridewealth had not been refunded by my clan. My parents could see what was happening but they did nothing. So I left, just as I was, without bathing or even washing my feet. *(The whole group laughs, including*

herself and I too). So you see I'm just property as long as I'm his wife (some members nodded in agreement, others chipped in, "yes it's true!"). But if a woman cohabits with a man (no kwanjula/bridewealth) and he mistreats her she can walk away saying "Did you buy me? You have no right to treat me like this" (again nods of agreement, laughter and 'yes! yes!' from the group.) (emphasis, bold, mine).

Asked about the nature of the relationship when she returned, she said ;

"He was not getting on well with the other woman so she left. He treated me well then and when he died he left me all the property."

There were cheers and laughter from the women. But one woman said ;

"But you see he had no one to look after him. So he had to get you." (*Again laughter from the women and Namuddu, and - "yes! That's the reason," from the group.*)

Another woman said ;

"Anyway, you got all the property."

"But after suffering first," said another woman.

"You see how these men treat us but they can't do without us," said another woman. (*"Yes! It's true!", other women chipped in amidst laughter*)

Namuddu's story highlights the general effect of bridewealth in the perception of rural women. The gist of her story is the lack of choice and the degree of control exercised over her (and her parents) in the marriage relationship as a consequence of the giving of bridewealth, which she and other rural women perceive as *treating a woman as property* to be bargained over and a price given as settlement. According to them, this gives expression in the attitudes and actions of a husband and his clan in the lived realities of a wife. Their constant laughter and spontaneous agreement with her story reveals their perception of their situation as something that is common to them but neither do they see it as acceptable. It is not easy for them to assert their rights. From their statements, the consequence of asserting oneself can mean loss of enjoyment of the property and loss of the relationship. Individual women voiced their opinions which

were generally echoed by other women or generally agreed upon by them. Their feelings and perceptions about the consequence of bridewealth are expressed below.

(a) *In relationships between husbands and wives.*

- "We consider that we were bought. Men also consider that we were bought therefore their property."

- "A woman is taken as property by her husband and his clan. Some husbands mistreat their wives. When a woman complains, the husband will say 'you were bought, I paid for you so I can do what I like with you.' Consequently a woman has little or no say in the home."

- "If the marriage breaks down the woman is expected to walk out empty handed. No one will help you get the things you took into the marriage or acquired during the marriage. This is because of the problem of bridewealth which would be demanded by your husband and his family. Your parents and relatives may not be in a position to refund it so they would rather you left your husband's home empty handed. But some parents and *ssenga* support this tradition so you can't be helped."

(b) *In the control exercised over her parents.*

- "A woman who ran away or left her husband would be returned to him by her family or he could go and fetch her from her parent's home. Her parents would not try to stop him. She had been 'paid' for."

- "If she left her husband and died even years later in her parent's home, he could go and get her body to bury in his village. Her parents would not resist because she still belonged to him. The only way the parents could interfere was if they could refund the bridewealth, something which parents, especially in the poor rural community do not find easy to do;

"If she returned to her parents, they would be too afraid to keep their daughter, dead or alive because of fear of refunding the bride wealth."

(c) *In property relationships.*

- "In the home, in many cases it is the man who serves the food at meal times, often keeping the choicest pieces and the most for himself. But among the educated it is rarely like this;

"There is a difference when a woman is educated and can support herself. She is not regarded as property. Even men respect such a woman."

- "Men prefer to buy things for their wives, even the *busuuti* they wear. Only a few women are given money by their husbands to buy anything."

- "It's the men who decide the cash crop to be grown. We manage the cultivation and harvesting but the men sell the crops so that they control the money earned. Even if a woman sells the crops her husband will demand for the money. He is the one who will give her money to buy things like soap and salt but he can do all that as well. *In any case women are property* anyway and they have no say. Very few women indeed have a say."

- "Some women come from well to do homes and borrow money from their families to do business and they earn a lot of money. But even then the man still considers the income as his."

(d) *At the death of the husband.*

- "The woman 'belongs' to her husband's clan, therefore when he dies she is expected to be 'inherited' with other property by either the brother of the deceased or if there's none an uncle. A woman who refuses to be 'inherited' may be chased away. Her husband's clan is generally displeased with her."

"I resisted and they wanted to chase me away from my late husband's home but I appealed to the RCs and his relatives have now stopped bothering me." (*the experience of one woman*)

I subsequently told the 12 men during their interview, which immediately followed that of the rural women that women felt they were bought through the practice of bridewealth and the subsequent treatment as 'property' by their husbands. There was resounding laughter and no attempt to refute the allegations. They responded ;

"If you do not give anything (bridewealth) than neither the woman nor her parents will respect you. You could not control her."

These statements reveal that according to *male perception* bridewealth gives a man respect in the eyes of the bride and her family and therefore the community. It was also a leverage for "controlling" a wife. The women were less concerned with 'respect' in the eyes of the community. The respect they wanted was in their marriage relationships with their husbands within the matrimonial home. The giving of bridewealth which was important to their communities took away this very respect that they wanted and adversely controlled their lives and that of their parents. Sometimes too, the support they expected from their parents and relatives was not forthcoming because some of them, especially the *ssenga* are 'guardians' of this cultural practice. As already seen, the *ssenga* is given a major role that carries equal respect and authority as the men negotiating, during the ceremony. She could not be seen to discredit this status. The alternative according to the women therefore appeared to be to 'cohabit' with no

bridewealth to bind them to the marriage or used as a tool of control within the relationship.

The findings reveal that on the one hand if bridewealth is given, a rural woman appears to have little control over her life. On the other hand if nothing is given the man will not have the respect of his community nor of his wife. The women, as seen from their reactions to Namuddu's experience, appear to perceive cohabiting as giving them more control over their lives. This however contradicts their earlier argument that bridewealth should not be abolished because a woman would not be respected by her husband. These contradictions go to the very root of the institution of bridewealth and reflect the contradictions in its current conceptualisation. Below the ideologies and debates around bridewealth are discussed to throw light on this.

6.1.9 Reasons for bride wealth

Armstrong and Ncube (1987:110) writing about *lobolo* (a common term for bridewealth in Southern Africa) in their WLSA project state what appears to be the significance of bridewealth in many cultures in Africa.

".....the *lobolo* given to the bride's parents served to compensate them for the labour expended on their daughter's upbringing and for the loss of her productive and reproductive capacity. In addition, the *lobolo* was a symbol which concretised the relations being established between the two families.....*lobolo* served additionally to stabilise relations between the new couple, since the wife would not lightly run away from her husband knowing that her family would as a result be obliged to restore the *lobolo*. It is clear then from the vast amount of testimony available, that *lobolo* has a great number of meanings and cannot simply be reduced to the phrase 'purchase of a woman' or 'bride-price'(bridewealth), however central and concrete this aspect may in reality be by virtue of the fact that by paying *lobolo* the husband becomes 'owner'(this is the expression commonly used) of his wife and of the children she bears."

Also according to Welch et al (1987:372) in their study of bridewealth practice in Mozambique, if a man did not give anything ;

" Even her family had no respect for their son-in-law. And the woman herself felt unprotected, She had no guarantees at all, the man could send her away at any moment. On the other hand if she had been purchased (*lobolo-ed*), the question had to be fully debated before there could be

a divorce, in particular, the goods paid by the man in respect of the bride(bridewealth) had to be restored."

The above statements clearly reflect the findings of the study among the Baganda in the interviews already described. The concept of bridewealth and inherent problems connected with it was more aptly put by the then President of Mozambique, Samora Machel (deceased) in his keynote address in 1983 to the Organisation of Mozambican Women. The organisation had been charged with conducting a nation wide discussion on the concept of marriage, attitude to *lobolo*, divorce and de facto unions. He observed that it was,

"... important to understand what lobolo contains as an element for establishing a family that is solid, has public prestige and social recognition. We must also know how to distinguish what are the rights over women and mercantile aspects connected with the practice of lobolo which challenge the dignity of women...." (Welch and Sachs : 1987 :386).(emphasis mine)

As in the case of the Mozambican experience, the Baganda men and women interviewed were mainly opposed to the mercantile aspect of bridewealth which turned the marriage into a business deal and which to the Baganda women equated them with property and therefore challenged their dignity. What appears to be the position is that men, who frequently have to find the means to pay the bridewealth, are unanimous in their plea for combating the commercialisation of the practice. Men and women also recognise that there is need, at the practical level, to discourage the subjecting of the groom to extravagant indebtedness arising from having to find the bridewealth. It is for these reasons that the Baganda men and women prefer that the amount given be decided by the man and should be seen as symbolic of a token of appreciation. The Mozambican women however found in their study that this would be futile if at the *ideological level*, the perception continued to be, that to be properly married, the bride had to be 'paid for,' and once she was 'paid for,' she belonged to her husband and his

family. This attitude is clearly evidenced in the perceptions of the Baganda men interviewed in the research. The Mozambican Women emphasised the need to preserve the *nature* of the bridewealth institution, described by the late President Samora Machel as "a social form for constituting the family and a public recognition of this fact". They however felt that there was an urgent need to change attitudes and practices to its *character* which emphasises the immediate exchange of some material goods in cash and /or kind, for the movement of the bride from her home to that of the groom, for the marriage to be culturally accepted. Implicit in that transaction is also the high spirit of profit to the bride's parents. This by implication meant the expression 'purchase of the bride' was in the current thinking of the Mozambican society synonymous with the traditional form of marriage (giving of gifts in exchange for bride) and it was the central idea. Consequently the rest of the ceremonies were merely regarded as accompanying the principal aspect which was the transfer of material goods in exchange for the bride (Welch et al 1987:387).

In the findings among the Baganda and in Mozambique, it is the parents and relatives of the bride who encourage the 'profit making' aspect of the practice. Ironically many who are married would have most likely experienced this and therefore know the hardships it brings to the groom and his bride. The Mozambican approach has been to talk through this with cultural leaders and the society at large before coming up with a feasible, social and legal solution. It is clear that the nature of this institution is an important foundation for the family. It is also in recognition of its nature that the Baganda women and men interviewed insist that bridewealth should not be abolished.

6.2.0 Effect of bridewealth on a woman's ability to assert herself.

According to Whitehead (1984: 176) and Strathern (1984:167) kinship practices and in the context of this study, relations between different clans and the exchange of persons and property that appear on the surface as self evident to the outside world, may have completely different hidden meanings and concepts for the persons concerned. Therefore to interpret bridewealth practice within a society there was need for specificity. A society has to be understood in its own terms and indigenous categories of thought to uncover the way it functions and regulates the lives of its members. The kinship system within a society generally embodies a set of rules as well as a set of symbols and values about the meaning of prescribed acts or practices. It is also this kinship system that construct the relationships between men and women.

Whitehead (1984:189) argues that the payment of bridewealth which imply the objectification of women should be seen as ideological and legal practices within the kinship system that;

"construct men and women as subjects differently so that *one gender may transact the other at marriage*. In so far as we are right to describe women *as objectified* by the form in which they are transacted by the marriage system, we can describe *men as full acting subjects, and women as considerably less than full acting subjects*." (*emphasis mine*).

Whitehead (1984) observes that in these marriage ceremonies, men 'transact' (*negotiate for*) women but women do not act to 'transact' men. This can be explained further by examining the *ideology* attached to a *woman's personhood*. She is *conceptualised*, as a *vehicle* for the passage of valuables or a means through which property passes from her husband's kin or clan to her father's kin or clan in exchange for her, a valuable resource herself. The husband on the other hand is perceived as the person who provides these valuables and receives her in exchange for them after

negotiating over the amount. It is therefore argued in our study that he is perceived as an *actor* or a *fully acting subject* because he makes decisions whereas she is perceived as a *passive actor* or a *less than fully acting subject* who moves from one location to another but her ability to assert herself is curtailed by what culture imposes on her as 'omugole' /bride. Decisions are made about her over which she generally has no say.

Strathern (1984) on the other hand argues that although women in some societies are equated with wealth during the marriage transaction, they are historically and culturally neither 'property nor wealth' nor 'objects' if those terms imply objectification per se. This is because the context in which they are equated with wealth are those of ceremonial exchange as in marriage. Strathern's theory is informed by Mauss (1926) in (Strathern:1984:164). Mauss asserts that in exchange relationships, the items exchanged create bonds between persons, what Cavina, in the interview refers to in the case of the Baganda bridewealth practice as '*okugatta amaka*.' His proposition is that the item itself is a person or pertains to a person so that to give something is to give part of oneself. It follows from that ;

"that when people are exchanged they may at that point stand not just for themselves but for aspects of *personal substance or social identity located at another level*. They are equated with 'things,' yet their symbolic referent is not a thing in the sense of an object, but aspects of personhood." (Strathern 1984:165) (*emphasis mine*)

It is therefore argued in our study that the symbolic referent for the bride at the *kwanjula*, her ceremonial giving away, in exchange for 'things,' is her 'value' which is located in her family and kin. "She is a girl from a clan and a respectable family, who have brought her up well, not just 'a girl from the streets' (*no proper background*). She is a girl with a good background" (*comment from interview*). She is an aspect of the personhood of her family and clan and their personhood has worth. The gifts given in exchange for her should therefore reflect this. On the other hand, the household goods

that her parents give her to take with her to her husband's home such as mats, baskets, hoe, kibbo, and other kitchenware are symbolic of her role as provider for her husband and children. They are conceptualised as part of her womanhood for the benefit of her new family including the husband's clan. This 'womanhood' should reflect the good upbringing.

The man's family on the other hand gives 'things' which in the past was mostly animals, that is goats, cows and, cowry shells (*the monetary unit then*), (Roscoe 1863-1923). Currently, the quantity and quality of what is given, including where the discretion is left to the groom to decide is important. As observed earlier in the interviews, on the surface it would appear to be on the one hand the 'buying' of the bride and on the other hand a reflection of the groom's family/clan and his ability to care for the bride. It is argued in this study that the gifts given, depending on how much is given, reflect, to a large degree, the 'value' and personhood of the groom. Like that of the bride, both these aspects are located within his family and clan therefore the value and personhood of both his family and clan. The *kwanjula* involves two different families and therefore two different clans coming together by giving aspects of themselves, that is, their personhood in two different 'forms' (the bride on one side and the bridewealth on the other) and consequently forming a bond. Although there is an element of bargaining, conjuring a sale transaction of the bride, it is argued that this can be interpreted as a struggle between the two clans over what each perceives as its own 'value' and the 'value' of the other, with the bride and the gifts as the medium through which this is expressed. In the light of the above discussions it is argued that the woman at the *kwanjula* is conceptualised not as an *object* but as a *subject* having the personhood of her family and clan and helping to create and more

so, to cement the relationship ('*okugatta amaka*') between the two families and two clans. Thus, although through the *kwanjula* certain equations are made between women and wealth /property /object, this study is in agreement with Strathern (1984) and Mauss (1926) that the 'things'(women and gifts) exchanged are part of persons and therefore not merely objects. They however have the '*quality of detachability*' from '*the subject actor*'(that is, the givers) making them powerful instruments in gift exchange (Strathern:1984:172).

6.2.1 The extent of control

In studying kinship systems and the construction of women, Whitehead has observed that it is necessary to examine ;

"...the extent to which forms of conjugal, familial and kinship relations allow her (the woman) *an independent existence so that she can assert rights as an individual against individuals*. In many societies a woman's capacity to act in this way may be severely curtailed compared to a man's. Conjugal, familial and kinship systems appear often to operate so as to construct women as a subordinate gender, such that by virtue of carrying kinship (or familial or conjugal) status women are less free to act as full subjects in relation to things, and sometimes people."(1984:189-190). (*emphasis mine*)

In the light of the above assertion by Whitehead (1984), the study will examine below the degree to which carrying kinship status of '*omugole/bride*' or '*Ssenga/aunt*' allows a woman an independent existence so that she can assert rights as an individual against others. As already discussed, the *kwanjula* ceremony is a requirement for any woman wishing to marry. The following analysis therefore covers the *kwanjula* for both rural and urban women. Whitehead's assertion will also be examined further in Chapter 7 where a woman whose husband has died carries kinship status of *namwanddu*/widow.

6.2.2 Control during the *Kwanjula*

As already discussed the cultural ideology behind the *kwanjula* is the giving of a consideration by the man's clan to the bride's clan, in exchange for her hand in

marriage. It is the giving, as it were, of a part of the self or social identity of each clan to the other. However, since each clan is determined to obtain the best out of this negotiation, each side seeks to control the other through the amount of gifts to be given which can result in protracted bargaining. The whole atmosphere of the ceremony is therefore charged with culturally elaborated forms of social control for the persons involved which includes both men and women. The bride, as the 'subject' of the ceremony or over whom the negotiations are made, is, as already seen, not allowed to speak for herself. Her non 'involvement' and silence and what appears as 'passiveness' is based on socially prescribed roles for female children in their respect for male and female elders in the community. Also a woman is expected to be submissive to her husband. This socialisation is located within kinship ideology. The women interviewed observed that a woman is particularly taught by her family to respect her husband and male members of his clan. Cavina said of the *kwanjula* ceremony ;

"On the one hand the parents and *ssenga* of the bride observe the conduct of the man and later advise their daughter accordingly. On the other hand the relatives who accompany the man also observe the conduct of the bride especially the respect and submission she conveys, and then advise the man. It is also a reflection of the way she has been brought up,"

In this situation, the bride who carries the status of '*omugole*' (bride) is by virtue of this kinship status and with the cultural ideologies that inform it, constructed as a subordinate gender and therefore less free to act as a full subject during the negotiations in relation to people and indeed to things. In relation to things because she has no say over the gifts given in exchange or appreciation for her and she is also the subject over which negotiations are held. It is argued that she is perceived during the ceremony as not only being a part of her parent's/clan's personhood but being *immediately under their control* therefore not having as it were, *a separate existence*

from them irrespective of whether she may have been living an independent life, something quite common among educated women or women in the urban areas. Consequently she cannot assert any rights against anyone once the ceremony begins but it does not deny her the right to refuse the man through her *ssenga*. This could happen in arranged marriages. Sometimes among the rural poor a young girl may be forced to marry a man of her parent's choice, something which is widely known and occasionally reported in the media. The bride can therefore be seen as a less than fully acting subject during the actual marriage transaction.

The *ssenga* must be a married woman. She was once a bride over whom negotiations were conducted as she sat 'passively.' During the *kwanjula* she wears two hats. On the one hand she 'embodies' and speaks for the 'silent' bride to help ensure that the negotiations are successful. It has been noted earlier that she is the person who introduces the groom on behalf of the bride to the bride's parents. On the other hand she represents the bride's clan as one of the most powerful negotiators. As a female before mainly male negotiators, she speaks with tact and respect as is culturally expected of a woman and yet her 'voice' carries a lot of weight and will be respected by the male negotiators. Like the male negotiators she is constructed as a full acting subject. In contrast to the bride, the kinship identity she carries as '*ssenga*' of the bride is a culturally prescribed and recognised role given to a woman from the patrilineal side by virtue of her *seniority*. This gives her the ability to *act as a full acting subject*. The control that would normally be exercised over her as a married woman or wife is loosened and one could add, 'lifted' to allow for fulfilment of her role as *ssenga*. It is also argued that this identity gives her *an independent existence* which allows her to

assert rights for and against individuals for example speaking on behalf of the bride and her family.

The above findings among the Baganda reveal that kinship construction of a woman generally depends on her status and role as prescribed by culture.

6.2.3 Extent of control within the home:

(a) Rural woman

Once again, although the rural women contend that they have little say in the home as a consequence of bridewealth, it is also clear that they do make decisions and take action where necessary though not to the extent that they would have liked to. Namuddu could not get her husband to chase away the second wife so she decided instead to leave. For two years she led an independent life until her husband took her back to his home. What her actions reveal is that bridewealth does not necessarily bind a woman to the marriage relationship. She can leave in situations of conflict but there are consequences that flow from that, the return of the bridewealth where the marriage is irreconcilable. A woman by virtue of carrying the kinship status of '*omukyla*' (wife) is more tightly controlled to remain in the marriage bond but not the relationship. As long as she is in the matrimonial home she does not have an independent existence from her husband to the extent that he will seek to buy the clothes she wears and the food she cooks. He controls the income to control her. She is also less able to assert her rights in the marriage relationship as for example, in Nammudu's case, where she could not do anything about the new wife her husband 'married' nor resist his demand that she returned to him after having left. However the fact that she could leave her husband's home in protest reveals that she can make decisions about some of her

personal interests and that as *a wife she perceives herself as an individual with rights* which she wants respected even though she may not be able to ensure that. This was a common feeling among the rural widows interviewed. When asked about the crops they grow and sell and property in the home this is what they had to say;

-“ When we cultivate and sell the crops, it is our contribution. We consider it as ours.”

-“As women we most certainly feel that the property also belong to us and we actually resent a man throwing his wife out or beating her.”

In terms of personal income in the home the control exercised over a woman in the growing of crops for income is pinpointed. The growing of cash crops is usually controlled by the husband because of the income from it. The wife can however grow food crops of her choice for consumption and some for sale. According to the women ;

“To get around this (a husband's control of money) a woman will make crafts such as mats and baskets, sell them and keep the money. She could even sell some crops and secretly put some money aside.(All the women laugh at this stage, some giving each other knowing looks, while others demonstrated where they hide the money- in their bra or round the waist!)

Its clear from their reaction that secretly putting some money aside was a common practice among the rural women to gain control of some income from their husbands.

But this action does not necessarily give her an independent existence nor the ability to assert her rights fully.

(b) Urban Woman

The interviews with the Kampala urban women (Figure 6.1) reveal that a middle class urban woman normally has a private income. She is also generally in control of her income or shared in the control of its use and management with her husband. Where she was in control, she made no secret of it to her husband. Below are the voices of five of these women (Fig 6.1):

Respondent 3: Age 34: (a university graduate with a small commercial business, married to a doctor) ;

"My husband's income is more than what I get from my commercial business. We always budget and decide together on major expenses. However I am the one who decides on household expenses. I generally use my income as I want but sometimes I consult him on how to use the money or I may even give it to him. I don't keep any secret income but I would openly insist on spending on what I want until he agrees with me. We have land that we jointly own and we make joint decisions about its use. But I also have land which is in my own names."

Respondent 6: Age 35 (a university graduate married to a teacher) ;

I have a higher income than my husband who is a headmaster of a secondary school. We put our money in a general pool and decide together how to use it. However I can use what I want as long as I let him know. Yes, he does have a say in my income but he does not insist. We agree."

Respondent 7: Age 38 (a secondary school education and a secretary married to a civil servant);

"I earn less than my husband. When I get my salary I let my husband know. But I do what I want with my money and he never asks. Anyway I only earn 15,000 Uganda shillings (\$15 US). I don't keep any secret income. My husband is not nosy and does not meddle in my affairs. We have land which I manage. I decide what to grow and I sell and keep the income. My husband never asks me how much I get or what I use the money for."

Respondent 10: Age 44 (University Graduate, lecturer married to a University graduate)

"My husband and I have separate incomes. He earns more than me. I do what I want with my money. My husband has no say and he never complains. He cannot insist on having a say in my income in any way. I do not keep any money secretly. I save money. It is my money and both of us know that each one handles his or her own income. Each one of us also has land. I manage part of my husband's land. I grow food on it for home consumption and for sale. Since I am the one who grows the food, I sell the produce and get income. I use it as I want. My husband never even asks how I use it."

Respondent 12: Age 62 (Secretary to a church women's organisation. Teacher training college . Married to a retired civil servant) ;

"My husband and I have separate incomes. Each one of us contributes to the need at home. Somehow things work out. When I do not have money I ask him and he always gives me. When he needs money I give him. I always make my own decision regarding what I should do with my money and he does the same. He cannot insist on having a say in my income. We always sit

and agree. We have land and it is in my husband's name. We worked together to acquire it. We keep cattle on the land and we manage it together."

It is clear that the level of education of these women put them in a different 'world' from the rural woman. They were generally married to men with professions and who had their own personal incomes. In the rural area both the man and his wife may be cultivators on the same land (see profile of Women from Rakai Appendix 7.1.A) with no other means of income and therefore compete for the same resources. The urban women had more choices with their income and felt no threat from their spouses. They perceived their incomes as theirs with their husbands having no automatic right or control. They are as it were *full acting subjects* in that they controlled their income whereas the rural women were *less than full acting subjects* because they had less or no control of the income which was generally in the hands of their husbands. From their testimonies the rural women resort to secrecy to control some of the income they make.

These findings reveal that the rural married woman is generally constructed as a subordinate gender with much less independent existence from her husband and less freedom to act as a full subject in relation to income and in relationship to her husband within marriage. She is also less able to assert her rights and therefore less able to control her life. On the other hand, the professional or salaried woman or one who has an independent income constructs herself as having an independent existence within the marriage and is able to have more control over her life. This is also reflected in the study of urban propertied widows in Chapter 7.

6.2.4 The current legal position of women and property in marriage.

The current legal position is that a married woman in Uganda can have her own property. In Uganda v Jemina Kyanda (1977) HCB (High Court Bench) 111, the court held that ;

"A woman in Uganda is capable in law to hold and to have her own separate property and separate from her husband and, in respect of such separate property, the wife is not debarred from instituting proceedings against her husband and vice versa."

The courts have also gone further in recognising a woman's right in matrimonial property based on her contributions to the assets in a marriage relationship. The courts based their judgement on received English Law. In the case of Edita Nakiyingi v Merekizadeki 1978 HCB 107, the husband and wife had been *married under customary law* and had lived together for 12 years. Both contributed materially to the building of the matrimonial home. The wife contributed to the roofing of the house. She also tended the garden and grew some crops for sale, which contributed to their resources. The husband subsequently terminated the marriage due to some misunderstanding and told the wife to leave the house but she refused. She argued that she had made some contributions to the family property therefore she had the right to remain. The husband however contended that whatever contributions were made by the wife towards the building of the house and the development of the garden were done so in her capacity as his wife and that did not entitle her to a claim. Both the trial court and the court of appeal (Chief magistrate) decided in favour of the husband. On second appeal, the High court decided that a trust for sale had arisen out of the substantial contribution made by the wife to the development of the garden and the building of the house. Consequently the wife could not be asked to leave unless the husband provided reasonable alternative accommodation. If that was not possible then he would have to sell the house and land and give half the proceeds to the wife.

In the above case the judge said ;

" Where the matrimonial home was beneficially owned by the husband and wife jointly, in equity or shares under a trust for sale neither party was entitled as of right to expel the other and thus deprive him or her of his or her share."

The law therefore recognises a wife's contribution in cash and kind which consequently gives her a right in the share of property in the event of separation, or divorce. This is irrespective of the marriage, customary or otherwise that she has contracted. By implication this also entitles her to a share at inheritance. For the rural woman who struggles to gain control of cash from her husband, her contribution in kind such as cultivation of the land which is a common occupation of a rural woman (See Figure 7.1.A) would give her security in the event of marriage breakdown.

The 1995 Constitution which came into force after the research was completed reinforces and entrenches rights to property. It prescribes under Article 26 that every person has a right to own property individually or in association with others and that no one is to be deprived of property or any interest in or right over property except in the public interest. In situations where a person entitled is being denied the interest or right by another it shall be compulsorily acquired for the aggrieved person. With specific reference to women, the Constitution provides among other things that laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by the Constitution (Article 33). It is also the *duty* of the State to protect women and their rights, "taking into account their unique status and natural maternal functions in society "(Article 33 (3). These provisions and others which are discussed in the recommendations in Chapter 10 have been hailed by women in Uganda as most revolutionary and directly addressing their needs. While from the research findings the level of education of the women was

already influencing their ability to assert their rights, the Constitution strengthens the protection of their rights. It has already been noted that legislators often impose rules on ongoing social arrangements. Then there is often ignorance of, and difficulty in the implementation of, the provisions. The provisions in the Constitution have come from the people and therefore embraced by them. Women from grassroots have, as seen in Chapter 1, also actively participated in the making of the Constitution. There is also the RC system with its executive and legislative powers and judicial functions and its use also as a tool for disseminating of information. These set of circumstances can be seen to contribute to a conducive environment for the realisation of some of the rights of women.

6.2.5 Conclusion

Although rural women perceive themselves as objects as opposed to the urban women, it is clear that the *kwanjula* ceremony was never historically or culturally intended to objectify them nor treat them as property though the rural women feel that it does so now. Emphasis on material gain through bridewealth in a country where the majority of the rural population is poor, has led to a woman sometimes being conceptualised as a means through which her relatives can enrich themselves. While some aspects of cultural practices are being eroded, the ideologies located within family and kinship systems that inform them are still deeply rooted in the society and therefore influence the lives of its indigenous peoples. The educational level of women enables them to rise above some cultural practices and to take more control of their lives. All the five urban women quoted were married and had had a *kwanjula* ceremony.

In the light of the findings on the impact of the *kwanjula* on the construction of women by the society, the next chapter explores the consequence for the woman of carrying

kinship status of widow/ '*namwanddu*,' and the extent to which she is able to assert her rights in the circumstances of widowhood where society imposes different cultural practices on her from that of the *omugole*/bride and *mukyala*/wife.

The research explores how the widows interviewed exercised their right to property and reveals their reasons for doing so. Much of their efforts depended on their perceptions of themselves and the property in issue and the easy access to structures that encouraged them to take action.

Interview with women in the capital city, Kampala

Respond- ent	Age	Education	Marital Status		
			Married	Separated	widow
1	27	O-level	cohabiting		
2	28	University	x		
3	34	University	x		
4	34	University	cohabiting		
5	34	University	x		
6	35	University	x		
7	38	O-level	x		
8	39	A-level		x	
9	40	O-level			x
10	44	University	x		
11	60	O-level			x
12	62	College	x		
13	70	Primary			x

APPENDIX 6.1

CHAPTER 7

WIDOWS AND CLAIMS TO PROPERTY

"...widowhood or the term widow.....describes more than a social condition, it connotes status. *However it is not the legal status that is the oppressor of women but her bowing down to a social and family-based status.* This externally imposed social status can be challenged by those who seek to do so. The challenge does not have to be confrontational, it can be achieved through dialogue. *Women have to find a way to rise above the death of a husband and assert their rights as independent, human beings who have full and unfettered legal status.* Only in this way can they *effectively challenge* the social status that is imposed on them as 'helpless' widows and make the term widow nothing more than a term descriptive of a temporary condition, as with the use of the term widower." (Aphane et al 1995: 27).*(emphasis mine)*

7.0 Introduction.

This chapter explores the extent to which women assert themselves at widowhood when family property is divided between the beneficiaries. It seeks to establish the consequences for the woman of carrying kinship status of '*namwanddu* /widow' on her ability to assert her rights at inheritance. The chapter reveals how she is conceptualised by kinship ideology at the death of her husband and the implications of this for her share to the deceased's estate. The study shows the strategies she employs in response to kinship action in the distribution of property. It also shows how she uses the choice of forums to achieve a desired outcome and the consequences of her actions on her. The chapter reveals the 'new image' of herself in contrast to the image at the *kwanjula* and in marriage. The purpose of this exercise, is to explore the extent to which she is 'prepared to assert her rights socially, economically and legally and to pursue courses of effective mediation between herself and her deceased husband's family' (Ncube et al 1995:36). This 'uncovers' her self perception and the extent to which she can and does control her fate and so dispels the image of the 'helpless and passive victim.'

This chapter also explores the question of 'who is heir' and whether there is distinction between heir to 'blood', name, status, obligations of the deceased and the distinction

between clan property, husband's property or wife's property and how a widow asserts her rights in these situations.

The Chapter is divided in two parts. The first part examines the experiences of widows in the rural setting in Rakai district and the second part, of widows in an urban setting in Masaka town to reveal the similarities or differences in their set of circumstances. As noted in Chapter 3 cultivation is a common way of life in Rakai therefore rural widows are mostly cultivators and generally have little or no education (Appendix 7.1.A). Masaka town on the other hand is a thriving commercial town, consequently the majority of the population are involved in retail business, commercial business such as exporting coffee, and the selling of local produce in the market places. The research which was conducted in the main commercial areas found that a great majority of women were in the retail business and market places. This is a common way of life for Baganda women in urban centres (Appendix 7.1.B) (see also the study of Baganda women by Christine Obbo:1990). The sample therefore shows a majority of middle class propertied women. The importance of the comparison lies in the choice of forums which urban women have as opposed to choices in the rural setting and the degree to which they assert themselves given their more favourable set of circumstances. A comparison can therefore be made on the choice of forums available in rural or urban areas. Most important however, is whether women, whatever background, are able to use the forums in their areas effectively. The implications of their locations and resources in assisting them assert their claims can give direction to policy makers to devise appropriate strategies.

The research also analyses the perceptions of these widows and their interpretation of inheritance practices especially in so far as it affected them. Sixteen widows were interviewed in Masaka and twenty in Rakai. There was some degree of similarity and

differences between the widows consequently a representative selection of ten widows, five from rural and five from urban were picked for deeper analyses in this chapter. This is not intended in any way to minimise the importance of the experiences of the other women. The study was concerned not so much with numbers although this undoubtedly gave a general picture of the extent of the problem, but with the *substance* of the experience or *lived reality* of a widow within her local cultural context and the impact of other variables for example her location and educational status.

Part 1 : Rural Women and Widowhood

7.1 The Experience; Death and division of property.

(a) Respondent 8: Death Testate

My husband had made a will before he fell ill. When he was ill he made another will because some of the property had been used. He hired a lawyer to make a will for him. We had a retail business but the capital we saved from it was used to nurse him during his illness. He died in 1992. My husband left a completed house and a half finished house next to it. He also left 20 acres of undeveloped land. For the children he had out of wedlock, he gave some land in the village where he had other property. But the main family property (the houses) were left in my control, and when I die it is to be left to his heir a daughter of 14 years at the time. *(She introduced the second eldest daughter, the heir, who is now 16 years of age, to me)*. My husband made her the heir because his sons were too young. *She is heir to property and one of the sons heir to blood*. I had no problems with my in-laws and the clan because of the will he left. But there was a man encroaching on the 20 acres of land. This started before my husband died. I have taken the matter to the RCs.

There were also household properties that my husband had left with friends and relatives in Masaka town. Some are lost and some were probably taken by the other women *(his mistresses)*. My eldest daughter who was named in his will to get some of his property also died and so did her husband. *(She reveals that they both died of HIV/AIDS)*. The relatives of my deceased daughter's husband took all their property. My mother-in-law who is also a widow is the one looking after their 4 orphans. She lives next door. *(Later the mother in-law and the four orphans are introduced to me)*. *(emphasis mine)*.

(b) Respondent 6: Death Intestate (effect of parent's contribution)

"When my husband died in March 1993, he had not made a will. He left a house, a bicycle, and four pieces of land. There was also a radio cassette.

After the funeral, the clan elders came to get his things (household property). I resisted their taking the radio cassette because my parents had bought it for my husband and I. Most of the property was distributed between our two children. I was only given a poor piece of land which cannot be cultivated, and some household property, so I went to the Probation office and my case was referred to the RC of the area for redistribution of the property. The fertile piece of

land and the residential house was given to the 'omusika' (heir) that is my four year old son. The radio cassette and bicycle were returned to me but I was only to be caretaker of them for the children. The properties which were bought by my parents were given to me but those bought by my husband were taken by my in-laws.

There is nobody in the house at the moment because I'm too ill to stay there and look after things that is why I'm living with my parents. The 'omusika' my son, has been taken by my in-laws but they allow him to come and visit me regularly. *(The respondent shows me the omusika who was on one of his regular visits)*. However, my daughter was left with me. I find that the RCs are sometimes biased in favour of the deceased husband's family."

(c) Respondent 3: Death intestate: (effect of widow's contribution)

"Before my husband died in 1992, we used to do business together, even travelling to the Uganda - Tanzania border for trade. I contributed a lot to the building of the residential house. With the money I personally made, I bought the iron roofing. I also made some contribution to the buying of this piece of land where the house is built. My parents also contributed. We cultivated on this land to earn more money. My husband did not make a will. So when he died my father-in-law who lives just across from us *(about 100 metres)* decided that the house and land should be for my 10 year old stepson *(husband's son)*. Because of that the stepson often tells me the house is his. Look! There he *(the stepson)* is staring at us and the house. *(N.B I saw him walk by)*. My stepfather also decided I should be chased away from the house. I complained to RC1 and RC2 who immediately stepped in. A local court session was held and the RCs decided in my favour. I have a copy of their judgement *(She shows it to me)*. That is why I'm in this house, but my father-in-law does not like my being here. Sometimes I feel uncertain about staying here because I do not have an official court document. Fortunately the Probation office is also assisting me.

(d) Respondent 5. Written will not respected by the clan.

"My husband died in 1992, living a will but it appears to have been changed because he had informed me of its contents, which was not the same as the document read at the funeral rites by the clan. My husband left a permanent house (residential), a motor cycle which was taken by my father in-law, a new bicycle, some land, a shop in Kyotera town and 6 cows. The clan left the residential house and land immediately surrounding it in my hands to live in with the children but they gave the shop to my in-laws. My eldest son was made the 'omusika' and 6 pieces of land were distributed between the children. I was given a piece of land which was rocky and very infertile to cultivate but I refused to accept it. Then some woman gave me advice and I went to the Probation officer in Kyotera who referred me to RC1 and they worked hand in hand to assist me regain some of our property. The motor cycle is now in the safe keeping of my grandparents and I was reallocated a fertile piece of land. The in-laws had wanted this piece of land for themselves. I'm concerned for the shop and the six cows which my in-laws still have.

(e) Respondent 7: Clan and RCs hand property to widow.

"When my husband died in 1987, his property was left to his eldest brother as the 'omukuza' /caretaker. This was decided by the clan elders. At the time he died he had a second wife living with him in the main residential house. I was in my village. The second wife was taken by the brother to be his wife *(levirate marriage)*. She lived with him for sometime then she decided to leave because she did not want to continue being his wife. I was then advised by the villagers who knew the deceased that the brother was misusing the residential house and other properties. I took the matter to the Probation officer who reported it to a social worker. A

meeting was arranged with clan elders and the RCs. They decided that I should take over (*possession and management of*) everything. The brother then had to leave and that is why I'm here now. There were 3 acres of land which were divided among all the children of the deceased. This main residential house is also for all the children, that is, both born outside or in wedlock. Since my husband died I've had a child with another man who is not from my husband's clan and the child lives with me. The in-laws have not complained."

7.1.1 The widow's experience of the division of family property.

The range of experiences of the five widows reflect that of the rest of the widows interviewed in Rakai (See Appendix 7.1.A for their profile). Their experiences reveal the central issues in the interactions that take place at the death of a husband. It is the division of property, between the beneficiaries, by the clan, with the purpose of ensuring that the property (or the most and the best) remain in the patrilineal or male line, that is in the deceased husband's clan, for the benefit of present and future generations. It exposes contemporary cultural practices at inheritance as opposed to what has been the historical practice. As discussed in Chapter 5, this practice is informed by kinship ideology in the Baganda society (Roscoe 1861-1923). It is the husband or a male who is recognised by kinship ideology as the clan head of the family and responsible for its wealth including persons deemed by the clan to be under his care. Consequently the death of a husband raises the issue of who is to be the '*omusika omukulu/principal heir*,' generally referred to as the '*omusika*,' and in the absence of this heir, the '*omukuza/caretaker*,' of the beneficiaries and the estate of the deceased. Again in line with kinship ideology these two persons are generally male. When a widow says she is *caretaker* (Respondent 6), she is referring to her responsibility for her children's assets only. This concept of *caretaker* is not based on the same kinship ideology that informs the status of '*omukuza*'. As revealed in the statement of Respondent 7 and later in the chapter, the '*omukuza*' can also 'inherit' a widow (Re Sulaiman Serwanga Salongo deceased 1972 U.L.R).

Respondent widows 3, 5, 6 reflect a common experience among the widows interviewed about their 'place' in the division of property; that children generally take priority over them. Respondent 8 reflects what they would like the position to be, that is, that they should have a right in the share of the property and that it should be left in their control. Respondent 7 reflects instances where the brother of a deceased is selected as *omukuza* in the absence of an 'heir.'

The testimonies of these widows illustrate some of the ways division of property is effected at widowhood by guardians of customs and cultural values who form the core of the clan and are often referred to as *clan elders*. The clan is a 'family-council' and has powers of decision making and social control over the lives and properties of those who, by virtue of kinship, familial, and conjugal relations belong to a particular clan as described in Chapter 5. The individuals who form the core of this decision making body are, in line with patrilineal ideology, from the paternal side of the family. Consequently in the case of the widow, they would include her father-in-law (experience of Respondent 3), brothers and sisters in-law (experience of Respondent 7), uncles and aunts and other 'senior' relatives of the deceased husband.

7.1.2 The clan and widowhood.

The widow perceives the clan as having authority at grass roots over matters of the estate of a deceased. To her, the clan on the one hand ensures her rights to the enjoyment of matrimonial property (Respondents 7,8), and on the other hand is a threat to these rights and therefore her means of survival and sometimes of her children's too (respondents 3, 5, 6). The experiences of the latter three respondents is a common experience among the widows interviewed, thus their concern with the poor nature of the land given (Respondents 5, 6), and the residential house (Respondent 3,6.). Land still remains the most vital source of subsistence farming and therefore

means of livelihood. Shelter is also another major area of concern. Both give a widow a sense of security especially where young children are left in her care.

The experiences of the widows, reveal that the husband's clan and members of his immediate family generally perceive a widow as an '*outsider*,' that is, not belonging to the husband's clan in the inheritance of property, irrespective of the marriage tie. As already seen in Chapter 5, a woman never becomes part of her husband's clan and it therefore follows that at the *ideological* level she remains an '*outsider*' and this is most visibly evidenced at inheritance. On the other hand, the discussion of the '*kwanjula*' in Chapter 6 reveals that the woman is also an '*insider*' to such an extent that she finds it difficult to leave the marriage because her hands are tied by the 'bridewealth' given at that time. However a closer examination reveals that she remains an '*outsider*' *inside the marriage*. This is reflected in the control the husband exercises over household resources including the serving of a meal. Through these actions, she is being told that the resources belong to the husband irrespective of her contributions. The resources are conceptualised as belonging to the home into which she has married and ultimately clan property. It follows that at his death the property continues to be conceptualised as her husband's clan property irrespective of any that may have been given as gifts to both of them (Respondents 3, 6). Consequently as soon as the husband dies, the husband's clan will seek to secure the property within the clan by giving it primarily to the children who are, as discussed in Chapter 5, regarded as belonging to the husband's clan. It may also be given to a male relative of the deceased as *omukuza* (Respondent 7) or the clan may divide it among themselves (Respondent 5). A widow is aware of this ideology and practice, thus, in some instances where property is left in her hands, she is aware that she is perceived as being a trustee/(*caretaker*) for the property of her children and with no rights in it. This may be explicitly stated by the

clan (Respondent 6), or the deceased before his death (Respondent 8), or may be implied through the way property is distributed. Property left in her hands by the clan generally means she has immediate *possession, use and management* but not *ownership* (Respondents 3, 5, 6, 7, 8).

The research shows that young children usually live with their widowed mother but their share of property is clearly spelled out by the clan. Where a residential house or any property is left in the hands of a widow, the widow's *possession and use* is intended to be and is generally shared with the children (Respondents 5, 7, 8). Respondents 5, 6 and 8 had one of their children made the '*omusika/heir*.' It is that child that has been installed by and is recognised by the clan as having *ownership* of the family property with the *control* generally remaining in the hands of the clan. The widow as mother, would generally be in charge of *management* of the property, as in situations like these, the child may still be a minor. A child may seek to take advantage of this and assert his rights to the property especially where the widow is not his mother. This would however be encouraged by an in-law of the widow, as for example, the father-in law of Respondent 3.

The clan may appoint a brother of the deceased as '*omukuza*' in the absence of an 'heir' (Respondent 7). This means that the property will come under the *omukuza's* direct *possession, use, management* and may put the property at risk of mismanagement as revealed with the brother-in-law of Respondent 7. The widows interviewed were concerned about the mismanagement of property because it threatened their shelter and means of livelihood. A widow can indirectly protect the property and at the same time have the benefit of the property through levirate marriage with the *omukuza*. However as revealed in Chapter 6, widows regard this practice as *conceptualising them as property* of their husband's clan.

Sometimes a widow may find as in the case of Respondent 3 that the property is under a direct and constant threat from an in-law or the eldest child of the deceased especially when not her own son. This may be where the property is in the husband's home village, which often means in his clan land and most probably within the vicinity where his closest relatives live, therefore within *clan sight and stronghold*. It is a stronghold because this would be where cultural practices find their strongest support and therefore means of expression.

7.1.3 Insights from opinion leaders

Three RC leaders in this district were interviewed to ascertain their understanding of the practices relating to the estates of a deceased male and their perceptions of widowhood.

RCI Chairman (male- also head of his clan): Five years in office

"According to tradition, property of the deceased was divided by and given to members of his clan as caretakers. There was fear that a widow would remarry and take the property to another clan especially in cases where she refused to be 'inherited' by a relative of her deceased husband."

RCIII Woman Representative: Five years in office

"Grabbing of property by the in-laws especially when the widow has young children is common. Where there are older children especially males, they are given the property by the clan because they are taken to be able to manage their father's property. Property grabbing is generally in cases where a person has not made a will, although sometimes the will is not respectedIn most cases the deceased tends to leave property to his legitimate and illegitimate children not to the widow. The reason being that some assume that by leaving property to children they're leaving them to the widow also, as she will be *caretaker* especially when the children are young. This also guards against clan fear that when a widow is given property and she remarries outside the clan, property will pass onto another clan. This is if she refuses to be 'inherited' by a brother of the deceased. On the other hand however, these days children grow up and marry and take control of the property leaving the widow with hardly anything. This is especially true where there is more than one widow and the heir can take advantage of the property in the possession of the widow who is not his mother."

RCV Woman Representative at District level: Seven years in office.

"Although the deceased may have left a will, the clan prefer to distribute property in the way they do culturally. There is emphasis on distribution to the children rather than the widow. Children are recognised as belonging to the father through blood line and therefore his clan."

Whether a widow is given property or not is sometimes determined by her behaviour during the marriage relationship. Distribution of property generally depends on how much the deceased has, but where there is a residential house and land, the clan tends to leave the property to the widow and the children who are young. Unfortunately widows tend to be chased away by older sons and stepsons or the in-laws."(*emphasis mine*)

In addition, Probation Officers who work in the district in their capacity as social workers were interviewed. Their perceptions can be summarised as follows:

"Tradition has it that widows get their share through their children. If they are given, they are regarded as custodians and on remarriage the clan insist that they leave the property for the children. Property acquired during marriage is taken to belong to the husband, whatever the widows contribution. When she dies it automatically becomes the husband's property."

It is clear that the clan has a central role and authority in the distribution of the property of the deceased. However the deceased may also distribute his property.

There is emphasis on giving to children, with widows seen as benefiting by remaining in the deceased's clan to look after the minor children and consequently his property.

The reference to 'grabbing of property' is reflected in the testimony of respondent 6 where the deceased's clan divided his moveable property among themselves thus depriving his immediate family of it. The widows interviewed were genuinely concerned about this. The four cases in Chapter 1 reflect the widespread nature of this practice around the country. The reported case from Western Uganda 'Widow killed over Estate' (New Vision Newspaper Tuesday 28/7/92 pg.3) reflects the extent to which this practice can be pursued especially where a widow resists and has no one to protect or assist her.

This practice reflects the *conflicts* in the lived reality of the society. At the *ideological* level society knows that the estate of the deceased is intended for the beneficiaries and ultimately for the future generations of his clan, with the cultural obligations to care for the widow also fulfilled. In *practice* however, it has the ingredients of 'profit' reflected in the discussion on the *kwanjula*. It appears to be conceptualised as a time for a

widow's in-laws to gain direct access to the deceased's property generally for their personal gain. On the other hand there are still concerns about a widow who is given property remarrying outside the clan and therefore obtaining the ability to transfer that property to another clan. This is also in light of their resistance to levirate practice discussed below.

7.1.4 Resistance to cultural practices

Although a widow is perceived as the most direct threat to the loss of clan property often times through remarriage outside the clan, the research did not come across evidence of any widow who had remarried into another clan since her husband's death. However the Probation Officers interviewed had this to say of their experiences in the area researched.

"-A widow may remarry and then she will use the deceased husband's property to benefit her new husband and children, at the expense of the deceased husband's children."

"-A widow may sell some of the deceased's property under the guise of supporting his children but will instead use the proceeds for her selfish ends."

"-Step mothers at times grab property from their step children especially the young ones."

"-Widowed sisters of the deceased who may have been denied property by their late husband's clan sometimes forcefully claim a share of their deceased brother's property to retain it in their clan but when they marry it benefits the new husband."

There was evidence in our research of some widows who had had children with men outside the deceased husband's clan. Respondent 7 said she had one child, Respondent 3 was expecting a child two years after her husband's death. Other widows interviewed, for example, Respondent 14 had two children and Respondent 17, three children. None of these women were in a marriage relationship. Evidence of these relationships that resulted in offsprings, and the experience of the Probation Officers suggests that the concerns of the clan about a widow remarrying outside the clan was genuine though not common. It was evident from the findings that widows were not keen to enter into another marriage relationship either through levirate marriage as

described in Chapter 5 or marriage outside the clan. Some laughed at the idea. They were genuinely afraid that the 'new husband' would take or mismanage the family property as in the case of Respondent 7. They were also afraid of being infected with HIV/AIDS. Rakai as noted earlier, has a very high incidence of HIV/AIDS. In the focus group discussion, widows asserted that the insistence on levirate marriage by the husband's clan was that they were primarily wanted as sexual partners and secondly it gave the person who took over a widow *legitimate and direct access* to the deceased's property. Usually, the brother of the deceased who takes over his widow is already married. This means that the property of the deceased is shared with his wife or wives and their children thus reducing, often considerably, the share of a widow and her children. Whereas in the past, a widow was catered for in the context of co-wife of the man who took her over, there is a growing resistance, by widows, to the married status of the man and to being a co-wife. Some widows saw freedom from the practice of levirate as giving them control over their lives. Consequently, rather than go through levirate marriage, they chose their relationships and cemented it with an offspring.

In Chapter 6, rural widows revealed that their husbands controlled the household resources, including decisions about other aspects of their relationship. This was illustrated in the testimony of Nammudu who was brought back by her husband after she had left him, for taking another wife. Widows felt they were now free to make personal decisions about their lives. The widows interviewed did not seem to have further conflicts with the deceased clan who left them in peaceful enjoyment of the properties except where there were still disputes over the way the property was divided (Respondent 5). It would appear however that the clan keeps a close watch over the residential house and land which to them is clan property. Judging from the experiences of the Probation officers, there was clearly a possibility of a widow selling

some of the deceased's property and also taking advantage of the property of the minor step-children of the deceased in her care.

Another aspect of widows' resistance is to the cultural practice of *conceptualising the deceased's property as clan property*, irrespective of the wife's contribution or contribution from her family (Respondent 3, 6) therefore to be shared within his clan. There is a growing perception among widows that the property in the marriage relationship is *a family unit property to be shared within the family unit*. Some saw their personal contribution (for example, Respondent 3) as giving them a right to a share. Consequently widows are *taking steps to assert their rights as individuals, to a share in the 'family unit property.'* This is also clearly reflected in their struggles to ensure that they and their children have adequate property and separate from any other beneficiary outside the immediate family. Through these struggles they are *redefining the family as a unit rather than as incorporated into the clan*.

7.1.5 The Experience of levirate from India

Research from India (Chowdry 1993:104), in the Haryana-Punjab region reveals that during the colonial times, widows often sought to be independent of the control of the deceased husband's family and to control the deceased's assets by rejecting *karewa* or *levirate* marriage. Unlike in the case of the Baganda, widows in that part of India can succeed to a life estate in the deceased husband's property, in the absence of a male lineal descendant. *Karewa* meant that a widow lost all her rights to property. The man a widow married was also as in the case of the Baganda, generally already married. This meant her deceased husband's assets would be shared with the 'new' husband's family and so reducing her share. Resistance from widows often took the form of illicit unions and having illegitimate children with men outside their husbands' families, a practice evidenced among the Baganda widows interviewed in the research in Rakai.

Widows from the Hryana-Punjab region saw this as protecting them against the attempts of their brothers in-law to assert their rights over them and the deceased's property through *karewa*. Their strategies to avoid levirate was however circumvented during the colonial times by threats from in-laws and stricter control over the deceased's estate through the legal system (Chowdry:1993:106-116).

7.1.6 Status of a widow for purposes of inheritance.

The attitudes and practices towards property are informed by kinship ideology which gives a married woman the right to use the family property/clan property as long as she remains married in the clan (Roscoe 1861-1932). In this way, it is argued that at the *ideological* level, a wife is *connected* as it were to the husband's clan through him, although she never becomes part of his clan. She is *mukyala* - a visitor. The point of entry into this connectedness is through bridewealth but is concretised through the fulfilment of her marital duties to her husband in what is seen by his clan as a *subsisting marriage*, briefly discussed below in Nabakooza's case. The husband therefore gives her the 'raison d'être' in the clan and the right to peaceful enjoyment of the property. Consequently when her husband dies, her *connectedness* to his clan is severed. At the *ideological* level, this means her right to the enjoyment of property which is conditional upon the fulfilment of her marital duties is also severed. In *practice* however, her right to the enjoyment of the property is conditional upon a number of factors. This may include her behaviour during the marriage relationship as stated earlier by the RCV Woman Representative interviewed. Most important is her marital status. At the death of her husband, it is important that she is *recognised as a wife* by the *husband's* clan, a subject explored in greater depth in Nabakooza's court case in Chapter 8 and 9. In that case, Nabakooza had lived with the deceased for several years and had had two children with him. In his life time she was recognised by the clan as

his wife. But at the time of his death she was not living with him due to his serious illness (HIV/AIDS) and some misunderstandings with her in-laws which resulted in their taking him away to their village. She was rejected by his clan as no longer his wife and considered not entitled to any property at his death. It is argued that her absence which meant non fulfilment of her marital duties was perceived by the clan as severing her rights to the enjoyment of property. In this way the widow's right to the enjoyment of family/clan property *before* and *after* her husband's death is conceptualised by the clan as finding legality in a marriage relationship with her husband that is seen in *their understanding* as *subsisting during his life time and at the time of his death*.

The role of the community into which a couple have married in determining status at death, is also reflected in the findings of WLSA (Aphane et al 1995:28). According to their findings ;

"Whether or not a person is treated as a widow or widower in the community remains for all practical purposes an extra legal question. The pronouncements of the law, may be ignored when it comes to the social realities and the daily practices of the people. Although at one level a widow's or widower's status is purely a legal question, in the reality of people's lives it is often one that is determined by the family and the community."

The practice of levirate marriage can also be seen as providing the *connectedness* to the clan. The *connectedness* which is severed at the husband's death is *reconnected* through levirate as the widow embraces the new relationship and continues with her marital duties and to live within the late husband's home in the care of another clan member. To the clan, *an unbreakable tie* to a clan can only be achieved through *blood relationship*. A marriage merely provides a connectedness to them through their blood member which ceases with death of the member. Their consequent relationship with her depends on *their opinions* of her and *their wishes* (Aphane et al: 1995).

Children of the marriage can also be regarded as *connecting* the widow albeit in a different sense, to her husband's clan since they belong to his blood lineage. Through

living with and caring for them on behalf of the clan she gains the right to the enjoyment of the property.

7.1.7 A widow's perception of herself.

A widow however perceives herself as much a part of her husband's family ('*an insider*') as her children at inheritance and therefore with the right to have a share in the property. Consequently she is not prepared to accept property that is not to her satisfaction (Respondents 5, 6). She believes that as the wife/widow of the deceased, she has the right to live in (Respondent 7), or remain in (Respondent 3), the matrimonial home, or to be in possession of (Respondent 5), or to be in control or management of (Respondent 8), the matrimonial property after his death. She also *conceptualises herself as an individual with certain rights and abilities*. During the *kwanjula* ceremony she had no say over the bridewealth (property). As a bride she makes *no material contribution*, neither is she expected to. Her rights are determined by her family with the *ssenga* playing a leading role. But as a result of her status, primarily as a wife of the deceased and the contribution she has made towards the home, she now feels she has a say. Consequently, where she has made an individual contribution as in the case of Respondent 3, she is able to identify the nature of the contribution which is often made towards vital assets in the marriage such as building a house, cultivating the land, acquiring household property, which she then perceives as giving her the right to a share of the family property. As shown in Chapter 6, women in rural areas generally make indirect contribution through cultivation of both food and cash crops but they are less able to take control of the resources which their husbands use at their discretion. In situations like these, a woman's contribution in kind, as pointed out earlier (*Edita Nakiyingi v Merekizadeki 1977(HCB)*), is to be taken into

consideration when determining her share in matrimonial property. She can also hold property in her own right.

A widow also perceives her family's (parents) contribution as *separate* from her husband's and therefore, when moveable property, should be returned to her parents through her, irrespective of whether the gift or contribution was for both her and her husband (Respondent 6). Where it is immovable as in the contribution to building a house, she feels that as the child of her parents she should have a share in it (Respondents 3). In this way she *conceptualises* her parent's contribution as belonging to them and also to her as their child because she is still part of them, having never within clan ideology become part of her husband's clan. It is also property from another clan, hers, to be jointly used with her husband, a person from another clan. The property is joined but separate. In that sense his death would automatically leave the said property in her hands. To the widow she is the *reason* for any gift or contribution made by *her* parents to the matrimonial home. To this extent she feels she has the right as an individual to make a claim against those who seek to deprive her and her family (parents) of their contributions.

In some instances, she perceives her rights to family property as above that of her children thus her complaints about being made only *caretaker* of her children's share with no rights whatsoever in the property, or being given property (*land*) worth less than her children's. In these actions she is stating that as *wife* and *mother* she has an *equal right* in the home and the property as her children but in the *control and management*, she has a better right.

A widow's conceptualisation of herself as 'property' at the *kwanjula* ceremony and during marriage therefore changes. As already noted it is the giving of bridewealth (property) in "exchange" for her and over which she has no say and its impact on her

husband's control over her in the marital relationships that determine her self perception in those relationships. Her point of entry into the marriage relationship was property transaction and property became the controlling factor. After his death the direct control in everyday marital relationship ends. It is also through the *subsisting* marriage that control by the clan is exercised. Death loosens the control (Dwyer:1982:518). As a person who was controlled she now seeks to be in control of her life which means making decisions about property which she could not at the *kwanjula* and in the marriage. She can also decide on the relationships she wants, thus the illicit unions as opposed to levirate. The findings reveal the extent to which some were able to assert their rights to property especially against the clan, to protect their interests. Widowhood therefore gives her this *independence* which she is determined to keep. Where a widow disagrees with property settlement she challenges the decision of the clan as 'a free woman,' free from the direct control of the clan that was exercised through her husband. She also fights this as a person who believes she is not subordinate in the family or in a husband/wife relationship in property relationships. The interviews reveal that a widow finds that there are forums apart from her husband's clan who recognise this factor giving her the support she needs to assert her rights.

7.1.8 Forums for dispute settlement

As already discussed, at the death whether of wife or husband it is the husband's clan which is entrusted under custom to distribute property while at the same time settling family disputes. This makes the clan an interested party. It is composed of a widow's in-laws. Consequently for a widow to disagree with the clan's decision is to disagree with a decision making body that has authority over her well being in terms of ensuring her livelihood and shelter. The research reveals that a widow is not deterred by this.

She looks for an impartial forum which has the powers to *negotiate* with or to *overrule* the decision of the clan and to ensure that in the process she does not lose her shelter and livelihood. Figure 7.2.A and 7.2.B illustrate the relationships between several forums which a widow can choose from, depending on her urban-rural location and her experience and individual background. Figure 7.2.A is the general experience of a widow from the rural area. The widow is encircled by the clan and takes action from within that. Whether she succeeds or fails, she will continue to be enclosed by the clan because of the physical location of the property (generally in the husband's clan land) and the clan's perception of the property as theirs (Respondent 3). Nabakooza's case discussed in chapter 8 illustrates a widow's use of several forums starting from the rural forum to the urban court to assert her rights.

The research reveals that a widow in the rural area will often seek assistance from the RCs (Respondents 3, 6, 7, 8) which are at *grassroots* and within her *locality* thus making her access in terms of time, distance and cost easier on her. On the other hand, dispute resolution within her locality may pose difficulties. The ideology of the RCs which emphasises justice and power for the people and by the people within their locality (see Chapter 4) means that local forums of dispute settlement may include interested parties and be open to interference.

"RCI generally face the problem of interested parties such as relatives and friends. This is because RCI members are generally drawn from the village or local area where one lives. This brings conflict with the village where people live their lives very closely..... In most RCs there is at least one woman, this encourages widows (women) to come to RCs to give their views or seek assistance."(RCIII Women Representative)

The RCI Women Representative had this to say ;

"In some cases the in-laws easily bribe the RCs to decide the case or dispute in their favour. Where an RC member is an interested party, for example, an in-law, the widow is advised to go to another RC. Sometimes one RC may borrow members from another RC to sit on their committee to help with settling the dispute."

The Probation officers had this to say of their experience.

"RCs are very useful because they are right at grassroot. They save the widows costs of travelling and lodging complaints in Magistrates Courts or reporting to the Police. In any case most people are afraid of the Courts and the Police. RCs are also generally within the community where the deceased lived therefore know well what the deceased owned. On the other hand, some may be relatives of the deceased therefore will take sides against his widow. Others are poor and are therefore tempted to take bribes from the deceased's relatives to decide a case in their favour."

Widows also seek help from Probation Officers (3, 6, 7). The Probation Office is in the Department of Probation and Social welfare within the Ministry of Gender and Community Development. In the area researched, their policy is to develop *community solutions* to the problems of orphans and widows in Rakai district in the face of HIV/AIDS (Roys:1994). This involves sensitizing the community about support to widows and the care of children who may have lost both parents, and encouraging them to make wills. The Probation Officers found that most people were reluctant to make wills as it is culturally considered an ill omen (*it might lead to one's death*) although people were generally concerned about the welfare of their families when they die. Suggestions to a person on his/her death bed to make a will was often taken to mean you wished for his/her death. The Probation office often found itself enlisting the help of local leaders especially RCs in protecting property from unscrupulous relatives of the deceased. They also network with Non-Governmental Organisations for example, Save The Children Fund and World Vision International who are involved in providing relief for destitute children, sensitizing the population about HIV/AIDs, teaching self help projects and other community concerns. The general emphasis is on mobilising people for community action and to provide community solutions. This has given the Probation office favourable standing and acceptance in the community including from the clan at inheritance. It is regarded as a conciliator and mediator in conflict situations and widows especially often turn to them when in conflicts with their

clans. Probation Officers are sometimes called upon by court to give information about the circumstances of widows and orphans who live in their administrative area and to assist in carrying out court orders (see Respondent 4 Chapter 1). According to the Probation officers interviewed, where a dispute cannot be resolved through mediation or where the presence of an interested party makes it difficult to entertain the dispute, a widow may be sent from the RC of her area to RC in another area. If this is still not workable, she is advised to go to a Magistrate's court. Among the widows interviewed only one, Respondent 4 (Chapter 1), took her case from the clan to the Probation office and finally to a Magistrates court.

The Probation Officers interviewed found the RCs to be the most popular forum for intervention in all kinds of disputes including with the clan, in spite of their short comings, a fact also confirmed by the RC leaders interviewed. The profile of Rakai Widows, Appendix 7.1. (column on forum of settlement) reveal that the RC is widely used. *This makes the RC system the most accessible and widely used forum for dispute settlement outside the clan, by widows and persons in the rural area.* This also confirms the findings of (Okumu Wengi:Ph.D:1994) and (Barya et al:1994) discussed in Chapter 4. Interestingly, this is in spite of questions that have been raised by the two studies about the partiality of RC courts in the rural areas to cultural practices. While on the one hand they uphold traditions, evidence from the widows interviewed reveal that they are still able to make decisions that grant them rights or protect them within the traditions. As noted in Chapter 5 the RCs were not created by the State to disregard tradition. They would not have been acceptable to the local population who in their lived family realities generally follow cultural practices. The RC system uses traditional methods of dispute settlement such as mediation and reconciliation which is easily understood and therefore more readily acceptable at grassroots. It is also within

the village therefore within easy reach. This saves time, especially for women whose lives are busy with caring for their families, through cultivation, food processing, and the like. The RCs were created to ensure that the voices of all, including the vulnerable is heard from where they are at, within their local environment. The avenue for appeal in the RC court system to the Statutory courts gives an aggrieved party the opportunity to 'opt out' of tradition should a person be discontented.

7.1.9 Status of widows in the cultural division of property: subjects or objects.

Levirate marriage appears to equate a woman with property and therefore objectify her. Through this marriage she appears to be conceptualised as part of her deceased husband's estate to be inherited by a member of his kin. It also appears to confirm the findings from the interviews with the women in Rakai that a wife is a wife of the clan and on the death of her husband another clan member is expected to take her over. Is she therefore objectified at inheritance? The answer lies in the kinship ideology that informs this practice and which is recognised by the law. The late Chief Justice Kiwanuka (of the then High Court of Uganda) gave a detailed description of the roles and responsibilities of the two categories of persons, *omusika* and *omukaza*, entrusted with the cultural responsibility of the widow and the children and the property of the deceased. In the case of Re Sulemani Serwanga Salongo, Deceased 1972 U.L.R. pg.122-123 he said;

"In Buganda the '*omusika*' means the *principal successor* to the deceased and he is installed at a well arranged ceremony according to Kiganda custom." At this ceremony "he or *she* is, as it were made to step into the shoes of the deceased. For example a man leave 10 sons. All are heirs to his different items of property left by him. But Kiganda customs require that he names one and only one of them not necessarily the eldest, to be "*omusika omukulu* (principal heir)".

The '*omusika omukulu*' becomes the 'father' of the remaining children and he is referred to and expected to be treated as 'father'. He is also responsible for all the

debts left by his deceased father. Elaborating further on the role of the principal successor among the Baganda, Kiwanuka C J said;

"...He is even *entitled to take on as his wives, all the wives of his deceased father who did not have children by him*, and he takes over the family house, so that to all intents and purposes, he is the sole representative of the deceased." (*emphasis mine*)

Justice Kiwanuka went onto explain that where the '*omusika*' is a minor, a guardian/*omukuza* is or guardians/*abakuza* are appointed. They are expected to be *caretaker* of the property of the *omusika* until he is of age. If there are other minor children with property, their responsibility is the same. They however have no power of disposal of the property but may advise on how the property can be used for the benefit of the '*omusika*'. They can also distribute property to the children of the deceased according to his will or clan decision. In this way the learned Judge argued, the duties of the *omusika* or *omukuza* embrace those of a person intended in English law to be an *Executor*.

Baganda kinship ideology therefore conceptualises levirate marriage as being part of the expected responsibility of the person who 'steps into the shoe of the deceased.' He is 'entitled' therefore he has a right to acquire the deceased's wife/wives *within the context of his obligations* to care for her/them as the deceased husband would have done. Although not mentioned by the Judge, a significant aspect of this practice is the element of 'consent,' discussed in Chapter 5 (Roscoe:1863-1932). This is also confirmed in the interview with RC leaders and by the focus group discussion with the widows. A widow is not forced into this marriage. In view of the element of '*responsibility*' on the *omusika*'s/*omukuza*'s part and '*consent*' on the widow's part, the study argues that levirate marriage is not intended to construct a widow nor operate to treat her as property nor to objectify her. At the *ideological* level this remains the position. The current experience of some widows is that the in-laws try to

force them into the relationship by threatening expulsion from the deceased's home or by actually driving away a widow. As already discussed, in the past a widow who did not want to be 'taken on' as a wife generally returned to her home (Roscoe:1862-1932). Nowadays widows insist on remaining in the matrimonial home regardless of whether they have consented or not to levirate. They perceive the matrimonial home as theirs by right-a right derived through the marriage and through their contributions to the matrimonial property. They also perceive themselves as *individuals with individual rights* to the house and household property which should not be derived through a relationship or a connectedness to the deceased husband's clan. They also do not want the *omusika/omukuza* taking control of the property. They perceive the current levirate practice as a means through which the *omusika/omukuza* can enrich himself without regard for them and their minor children. That as in bridewealth practice, 'profit' rather than obligations to the deceased's children and his widow appears to be the driving force being the *omusika/omukuza*'s current role, consequently the threats from in-laws. The general principle that it should be a widow without child who should be taken over (per Kiwanuka C.J) is disregarded. There are some factors that currently affect this. The deceased may have had only one wife with whom he had had children or all his wives may have had children. The cultural obligations towards the children and widow(s) however remains the same though levirate should not be forced.

7.1.1.0 The Zimbabwe experience

The findings by the WLSA project (Stewart:1991;13-14) on the Ndebele custom in Zimbabwe also reflect some similarity in the ideology and the practice of levirate marriage. One of their informants, Chief Mkanganwi of Bikita described the practice of *Nkaha* ('widow inheritance');

"*Nkaha* was practised but it was never imposed on a woman. She had to demonstrate her willingness to *nkaha* by offering a dish of water to the brother-in-law of her choice. If she was not interested in becoming a wife to any of the surviving brothers she simply gave the water to her son. This act symbolised her willingness to remain part of the family of her deceased husband without necessarily becoming a 'wife' to one of his brothers."

Stewart (1991:13) argues that in view of the way *nkaha* is practised, it was the widow who made a decision whether she would marry into the late husband's family and who it would be. She had a choice consequently the practice could not be seen as 'widow inheritance,' a terminology that equated her with the 'deceased's estate' and therefore constructed her as property. She argues for a re-examination of the terminology. This implies an understanding of the historical and local cultural context in which the ideology is located.

7.1.1.1 Female as Heir

It is important to note that whereas the heir is generally known to be male because of the patrilineal nature of the society, there are exceptions to the rule. Roscoe (1863-1923) documented evidence of females 'inheriting' widows of deceased males who became their slaves but only where there was no male heir. Chief Justice Kiwanuka also pointed out that a principal successor could be female. In view of the subordinate position generally equated to women at inheritance which are often publicised, it is important in this research to '*uncover*' and make 'visible' their hidden images.

Respondent 11 (Appendix 6.1 Chapter 6) said that her father first gave her a piece of land before he died. In his will he made her heir to the residential house where her mother was currently still living. Her brothers and sisters also received property (mostly land) although her share was the largest. Respondent 7 (Appendix 6.1) said her father made her and her four sisters heir to the residential house and five acres of land. There is no doubt that female children generally inherit shares in their deceased father's

property with his sons. The main question is what the term '*omusika*' stands for in cultural ideology.

Respondent 8 revealed that her daughter was made heir. She said of her daughter when her husband died;

"... My husband made her the heir because his sons were too young. She is heir to property and one of the sons heir to blood."

This was explained further by one of the RC women representatives. She explained that generally when a person is made the *omusika* /heir, that person is '*heir to blood lineage*' and therefore carries the family line. In her case, the RC woman representative said, her husband had made a will and made their daughter '*omusika/heir*' because their only son had died. But her father knew that her husband's clan would not accept it so he changed the will and made the daughter '*heir to property*' and one of the sons her husband had had outside marriage '*heir to blood*'.

This was accepted by the husband's clan. A woman could not be seen to carry on the blood line within the patrilineal society especially when there is always the possibility of her marrying into another clan. At the *ideological* level if she carried the blood line and did marry into another clan the effect of the marriage would be, as it were, to transfer the blood line of her deceased husband's clan into another clan, something which was inconceivable to the deceased's clan. It is however peculiar that the clan would agree to the daughter being heir to property where there was a greater risk of clan property being transferred into another clan if or when she married, something the clan was opposed to for the reasons already discussed. The findings imply that *heir to blood lineage* is the *essence* of customary heirship and generally carries with it the obligations to people and property. Consequently the word *omusika/heir* embodies that meaning. This could explain why the Chief Justice did not attempt to make the

distinctions between '*heir to blood and heir to property*', neither did the women and the local leaders who were interviewed, except for the two discussed above. However there is clearly customary distinctions of the nature of the 'heirship' and sometimes, as seen in the case of Respondent 8, circumstances may arise when it becomes necessary to make the distinction. This issue is also highlighted in Stewart's study of the custom of the Ndebele of Zimbabwe, on a daughter's right to inherit (1991;14-15). In her analysis of Supreme court case decisions on customary practices, she found that daughters were frequently beneficiaries in their father's estates although not as heirs. However some customs did grant them that status. What she discovered as not clear in cultural practices and in court decisions was the lack of recognition of the *customary distinction between the heir to the name, status, and family linked obligations and the person or persons who inherit the material goods of the deceased*. This would give room for females, that is daughters or wives to be heirs of aspects of the heirship that would not be seen as infringing on certain customary values. Stewart was arguing for a reconsideration of the whole nature of customary law.

The research findings reveal that individual children can and do inherit individual items of the deceased. There appears not to be much emphasis on the deceased's moveable property. Most women interviewed were concerned with who was given the residential house and the land or pieces of land (Chapter 5 revealed the importance of land in the Baganda kinship structure). The research did not dwell on the different aspects of heirship as described by Stewart (1991). However Justice Kiwanuka confirms Roscoe's (1862-1932) findings that the *Omusika* carries with it the 'status' of the deceased and all that is incorporated in that, primarily responsibility for children, widows, and property of the deceased. So he also carries the title of '*kitawe*' (father) of the children.

7.1.1.2 Effect of carrying kinship status of *namwanddu* /widow

In the light of the findings in the rural areas, '*to what extent does carrying kinship status of 'namwanddu/widow' give a widow an independent status so that she can exert her rights as an individual against others*' (Whitehead: 1984: 189).

The division of property at inheritance reveal that the general effect of a woman carrying kinship status of '*namwanddu*' is that it operates to construct her as a subordinate gender at inheritance in that she is not entitled to succeed to property. Whatever she is given is also tightly regulated by the clan. However the current assertiveness of widows encouraged by the availability of forums where they can assert their rights gives their status new meaning as described below.

At the death of her husband the widow's *connectedness* to the clan is severed. Thus at the ideological level her *dependent* existence as a wife is severed and she can be said to have an *independent* existence during those particular moments. The practice of levirate marriage once again connects her to the clan and takes away her *independent* existence. However the kinship ideology that property should be given to the husband's blood lineage thereby excluding the widow means that she is perceived as having a *separate* existence from them in rights to property. When the husband's clan members deny her property and seek to chase her away they inadvertently allow her an *independent* existence from them thus giving her the room to *assert her right as an individual* against them. Where she also rejects levirate marriage, insists on staying in the matrimonial home, and seeks to be in possession of property she is insisting on an *independent* existence for herself. In her new found independence from the control of the male, a widow finds that it is necessary to protect what she perceives as hers. The interviews reveal that widows are not afraid to assert their claims outside the

traditional forum against individuals who interfere with what they perceive as their rights. This is explored in greater detail in chapter 8 and 9 because it raises important issues about the relationships between the various forums and their place in society and especially statutory law which has often been seen as the way for reform.

Some widows had exercised their new found independence, *their independent existence*, in the liaisons or relationships with men outside the deceased husbands clan which had resulted in children and who were living with them. The presence of another man in her life is a form of protection for the widow from insistence to concede to levirate marriage. In asserting herself in these different ways the widow perceives herself as an independent individual with rights that should be protected. The current law of Succession provides some protection and is discussed below.

7.1.1.3 The Current law of succession

The Succession Act(Cap 139) of 1906 was originally reproduced wholesale from the English common Law during the Protectorate. An order under the Act of 1906 had expressly provided that the Act did not apply to the 'natives of the Protectorate' and was confirmed in the case of Re Mohamed H Vasila .v. W. Sophia (1920) U.L.R. 26.

It was incorporated primarily to cater for British subjects working in the country. Consequently the indigenous people were guided by their customary practices except those 'natives' who chose to marry under the Marriage Act of 1964 (marriage in church and Registry Court) which by necessary implication meant that they had 'opted out' of customary law in all their family relationships. Under Statutory Instrument No.181 of 1966, there was a amendment which meant that the greater part of the Succession Act as received applied to all persons in Uganda without distinguishing between race or religion. There was still however a major problem. The part of the law relating to those who had died intestate did not apply to 'natives' subject to customary

law, generally the majority of the population. Customarily most people die intestate because the clan distributes property. This Statutory Instrument therefore left intestate succession for 'natives' to be guided by their customs. Consequently the persons most adversely affected by this were widows and children especially where there were unscrupulous relatives of the deceased (Nanyenya P:1972). In 1972, the Succession Amendment Decree No. 22 of 1972 was passed making all provisions of the Succession Act applicable to all persons and is now entitled 'The Succession Act as amended by The Succession (Amendment) Decree (Decree 22 of 1972)'. To ensure that 'natives' subject to customary law were catered for, it incorporated customary practices into the Statute. It provided for example, for the recognition of illegitimate children in the distribution of the deceased's estate, the recognition of polygynous marriages and the share of all wives, and the appointment of the customary heir. These provisions had not been included in the amendment by Statutory Instrument No. 181 of 1966 which in principle upheld English concepts of Succession.

The current Succession Act as amended however includes some radical changes to customary practices. For example, although the appointment of the heir is still subject to the custom of the deceased (Section (3) of the amended Act) the Act provides that where there is no customary heir a 'legal heir' can be appointed, by law, from any of the relatives of the deceased within his extended family (clan). The law clearly defines a 'legal heir' as either male or female although a male should be given preference. The 'legal heir' also includes a wife in a monogamous marriage or a senior (first) wife in a polygynous marriage. The provisions including the wife or senior wife as 'legal heir' is contrary to customary practices. The law also sets out the share of persons entitled, where no will had been made. Section 28(1) provides that the customary heir is to receive 1%, the wife (wives) 15%, dependent relatives which is generally a reference to

parents and members of the extended family dependent on the deceased at the time of his death 9% and children 75%. These shares depend on who survives the deceased. If for example it is only a wife who survives the deceased, all the 100% would go to her. The division of shares applies equally to the property of a deceased wife although in her case presumably there would be one husband. The law prescribes circumstances where a wife or husband person may not take an interest in the deceased property (Section.31(1)). It is designed to guard against one spouse who had deserted the other and returns to claim property at his/her death. This section is discussed in Nabakooza's case in Chapter 8 and 9 where the relatives of the deceased invoked this provision.

The law also provides that any person of sound mind and not a minor (below 18 years) can make a will (Section 46.(1)). It specifically emphasises a married woman's right to dispose of her own property by will (Section.46(2)). Another important introduction to customary practices is the office of the Administrator General. All properties inherited whether by will or through distribution by the clan require grant of Probate or Letters of Administration respectively, in a court of law (Section 234(1)). In the event of unresolved disputes between the beneficiaries, the Administrator General is empowered to take over the Administration of the deceased's estate (Administrator General's Act Cap.140). Again this is contrary to cultural practices where the clan generally takes over administration. 'Property grabbing' by any person or unscrupulous lives as described in the research findings is considered 'intermeddling' (Section .268) and is made a criminal offence punishable by imprisonment and/or fine.

Perhaps the most important move is the provision in Schedule 2 of the Succession Act which protects interests of widows and the deceased's children.

The main sections of the Schedule provide that the residential holding which the deceased normally lived in with his family (the residential house) will continue to be

occupied by his widow until she remarries and by the children, under 18 years if male or 21 years if female and unmarried (S.1). Where it is only the children who are entitled to occupy the house, the person legally entitled to their custody is also entitled to occupy with them. If there is no such person the court may appoint a person or persons. These provisions apply regardless of whether the house has been willed to another person or given to the heir. The heir or person entitled can only have complete possession if he/she can provide a suitable alternative accommodation. Any land surrounding the deceased's estate is subject to the same provisions. Where the deceased's residential house was rented at the time of his death, it is to revert to his family for their occupation. The only person protected against the right of occupancy by the deceased's family is a mortgagee where the mortgage was created before the death of deceased. Other sections are discussed where relevant, in the subsequent chapters.

The whole *essence* of Schedule 2 is to protect the immediate family of the deceased, that is the widow and children from being dispossessed by customary practices. It is however clear from talking to widows and the RCs in the rural areas that they generally had no idea of these provisions. Nabakooza's case in Chapter 8-9 is used to illustrate the plight of a widow from a rural area who does pursue remedy in the Courts and the court invokes some sections of Schedule 2.

7.1.1.4 Rural widows and their choices: Conclusion

Although widows in the rural area live within clan stronghold in what is generally perceived as a subordinating environment, they are able to use the 'tools' within this environment to assert their rights. Their ability to do so is dependent primarily on their perceptions of themselves as individuals with rights that they feel should be protected. This ability is also enhanced by the RC system. Within the rights are their values,

values of themselves as people who should be treated with respect. They see levirate marriage as devaluing them unless it is a personal choice. Sometimes this personal choice is exercised as a *strategy* to 'keep an eye' on the deceased's property and to have the enjoyment of that property which was gained through shared effort with the deceased. This is especially in situations where reluctance to levirate may mean being chased from the deceased's home without any property. From a category of persons generally perceived as being *silent* and *passive victims* or keeping out of public domain, the widows interviewed reveal that when it concerns their values, when their livelihood, shelter and their general well being is threatened, they can and will take their case to a public forum. *'They will not bow down to a social and family based status of 'helpless widow' without challenging it either through dialogue or confrontation.'* Their various *survival strategies* (Tadria:1989, Armstrong:1995) and struggles can be perceived as *'meaningful ways of coping'* (Lazreg:1994). Widows have also come to appreciate the role the forums outside the clan often play in supporting their claims consequently their current use of them.

PART 11

7.2. Widows in urban areas (Appendix 7.1.B)

The Experience; Death and division of property

Respondent 11: (Teacher/Business woman) Death Testate

"My husband and I were both teachers at the time we got married. Two years after we got married we decided to start a business together with the resources we both had, and we continued to acquire everything together. At the time of his death we had a house and a shop but they were in his names. My husband had left a will but his own family members did not respect the will. They took it away saying that I should not inherit the properties as stated in the will. My husband was the heir of his father so his father had given him some property but his family members were dissatisfied with what his father had done. The in-laws wanted the house and the shop which I had been in charge of, so I hired a lawyer. However we have not gone to court because the in-laws have stopped bothering me. Fortunately the in-laws did not take any property from the house but a brother of the deceased came and destroyed my garden with

matoke(plantains), fruits and vegetables etc. I did not take him to court or report him to the RCs because my house is built within my late husband's clan land. Also one of my sisters in-law and her husband took away our weighing scale for the shop. They said my children would not get what my husband had left them in his will. I hired a lawyer who advised me not to take the matter to court until after the clan had appointed the heir because they would have to follow the will. I subsequently applied for letters of Administration and I got the letters through court. My application was published in a local newspaper but none of the in-laws contested it. But I don't think they know that I have it. My late husband taught me about the law. He said if he died before me I should get Letters of Administration and not tell anyone. "Don't sit and do nothing" he said. He also said, "Don't let my relatives disturb you," and he warned my children about studying and caring for the property.

After his death I changed the shop to a bicycle spares shop. I also have a plot of land where I grow and sell food stuffs to help raise school fees for my children."

Respondent 2: (Nurse/Business woman);Death Intestate

"When my husband died in 1993, we had a permanent house in my husband's name, a plot of land, a shop which I used to help run, a vehicle, cash and stocks in the shop. My husband was a well to do businessman. The other wife had her own house. Since we were Muslims, we are supposed to use the Koran to settle inheritance matters. According to the Koran girls get ½ the share of boys. My husband's family wanted us to share all the properties between me and my husband's other wife and all our children. I refused because I had only two girls and I knew they would be given ½ of the male's share and they are also still young. About five months after my husband's death the in-laws started to complain about my reluctance to hand over the household properties as they wanted. So I went to the office of the District Administrator(DA) (since 1995 title changed to Central Government Representative). He invited the relatives for a meeting but they refused. So I went to a lawyer and he arranged a meeting with the RCs of the area where my husband's land and house were. The DA was also involved. The in-laws then agreed to settle the matter out of court through family and agreed not to touch my house and the property in the house. I was also given a lorry and a pick up. We shared the stock in the shop. Again I went to the DA's office to get his official stamp on the property settlement. Later I compiled a list of properties given to me and I hired a lawyer who assisted me get the letters of Administration. Although the house has been left to me, transferring the title deeds into my name is too costly for me at the moment.

Currently I have a shop dealing mainly in selling clothing material. I also keep poultry for eggs. I use the lorry for personal business or hire. At the time my husband died the house we lived in was not completed. I've completed the house and added a guest wing which I'm renting. I came to know something about women and the law during my struggle. I learnt from a fellow widow who had lost everything when her husband died."

Respondent 9: (Senior husbandry officer); Wife's contribution to deceased's estate.

"My husband was an Accountant at the time he died in 1984. I was employed by the Government as a Veterinary officer. We both earned money and shared everything so I considered that the property belonged to both of us. We had a plot of land in my husband's name. We had also started building a house. On his death, the in-laws came for the property but I resisted and they did not get anything from me. It is possible that it was because I was more educated than them. My husband was the most educated in his family. But also if a wife depends on the in-laws to contribute to their needs during the marriage then they feel they should interfere in property settlement. But when you can stand on your own then it is easier to stand your ground when your spouse dies. I applied for letters of Administration and none of

the in-laws contested the letters. I was assisted by a lawyer, but lawyers are very expensive. I went to them not knowing that I could go and handle the case myself in court. It took one month to get the Letter and I used the RCs to certify the Letter. I applied for and got it in 1993. Education is very necessary to give women information about the legal procedures in court. I didn't know much about the law but the circumstances forced me to seek legal redress. I still know very little through my experience. My husband had not made a will but I think people should make wills to assist with the distribution of property. There should be safe custody for the wills.

To make ends meet, I started zero grazing (*keeping cows for milk within a small enclosure*). An NGO (Christian Children's Fund) advanced me a soft loan which I used for starting the zero grazing and keeping poultry. In 1992 I was able to open a shop in the town which deals with veterinary essentials (drugs, feeds, etc.). This has assisted me in looking after my family and to continue with building the residential house.

Culturally widows are supposed to be inherited by a brother of the deceased who in the majority of cases is already married. Some widows may not be willing to be inherited but the circumstances force them to succumb. Also the traditional and cultural environment puts pressure on them."

Respondent 12: (Diploma in Education: currently owns a clothing and mattress shop).

"My husband died in 1989. He was a graduate teacher. My late husband had made a will which he deposited with his family. So when he died nothing was taken from me. He had also said no child was to be taken from me. Both our families had got on well. They were well educated families.

We had three pieces of land. One my husband inherited from his father. We bought the other two pieces of land which were transferred into my names at the death of my husband. At the time of his death. I was in business in a small shop which belonged to us on credit. My friends assisted me. Also I was able to get a loan from the bank. The loan that I get from the bank has now increased because I faithfully repay them. Goods were also given to me on credit but I repaid the credit. I have now succeeded in building a house with the help of friends.

I did not apply for letters of Administration because the will made everything clear. The RCs gave me a letter of recommendation to the town council concerning the shop which I'm occupying at present. Currently I'm a full time business woman and my business has expanded. In the rural areas women can have no claim to property since they do not acquire property. But in the urban centres women can and do acquire personal property which they claim when there are disputes."

The fifth case examined is *Respondent 5* whose experience is set out in Chapter 1

7.2.1 The widow's perception of the in-laws/clan.

It is very significant that urban middle class widows *do not make claims* to property as rural widows. With rural widows, the interviews reveal that property is divided and a widow takes action as a result of her dissatisfaction with the division. Urban widows

generally take steps to legalise their rights to what they see as their ownership of the property against claims from the clan /in-laws.

The actions of these urban widows reveal that they perceive the clan as not having the right to divide the deceased's property (Respondent 2, 9), or the right to a share (Respondent 5, 9, 11), let alone to having physical access to the property. As in the case of rural widows, urban widows perceive the matrimonial property as '*a family unit property to be shared within the family unit.*' They however take more direct steps to ensure this. They conceptualise the in-laws as '*outsiders*' and as not having authority over their lives.

Their actions reveal that they perceive the formal courts and its agents (lawyers), and other administrative forums such as the RCs and the DA (CGR) as having authority in the distribution which gives them control over their lives. Consequently the widows interviewed did not see the threat their in-laws posed to their property as something beyond their ability to resist. Most of them denied the in-laws access to the property from the onset unlike in the rural area where in the majority of cases the in-laws had immediate access and proceeded to divide the property before the widows took action. Thus Respondent 2 initiated a settlement which involved the in-laws agreeing to her terms. Respondent 9 relied on the fact that she had been independent of their assistance during the marriage, to '*stand her ground*' when her husband died. This was enhanced by her level of education. The in-laws kept their distance. Although the in-laws of Respondent 11 took the deceased's will to stop her from getting property, they did not succeed. In anger, a brother in-law destroyed food stuffs in the garden, knowing the importance of this to her and her family. A banana plantation takes several months to grow and is a major staple diet of the Baganda. The sister in-law took a weighing scale from the deceased's shop, again an important tool in the trade. The actions and threats

of the in-laws reveal their frustration with the widow's ability to fight them (the clan) through the formal law, a topic analysed further in Chapter 8 in Nabakooza's case. Although Respondent 11 expresses some concern over *'her'* house being in clan land therefore within clan stronghold, she is aware that it can easily be protected by the law and that the in-laws are fearful of this fact. What is significant is her perception of the house as *'hers'* and not belonging to the clan although in their land. Respondent 5 (Chapter 1), lost some property to the clan but took successful legal action to protect the residential house which she perceived as *hers*.

7.2.2 The urban widow's perception of herself.

As already noted a widow's ability to control her life is also determined by her self perception (Ncube et al 1995:35-36). It is important to note that the *level of education* of these widows is generally significantly higher than that of the widows in the rural area. What is important here is how a widow perceives herself and the extent to which she is able to assert herself given her more favourable set of circumstances.

Respondent 12 perceived her level of education and that of her husband and their families as a major factor in her peaceful enjoyment of the deceased's property which he had willed to her. She implies that education can override negative cultural practices. Respondent 9 *conceptualises education as a key* to women being able to assert their rights under the law. *"Education is very necessary to give women information about the legal procedures in court."* She also conceptualises her level of education, which was higher than that of her in-laws *as a possible tool of resistance* against her in-laws' actions. Education also gives her the means to be *independent* of assistance from her in-laws thus leaving no leeway for them to interfere in property settlement. *'But when you can stand on your own then it is easier to stand your ground when your spouse dies.'* This implies that assistance from in-laws provides a

leverage for them to control a widow. Armstrong et al (1995:6), in their study of the changing nature of inheritance customs in Southern Africa found that:

"customs are changing in that some women work for wages and therefore have resources independent of the extended family. Customs are changing in that some would rather be independent than be protected by the family."

This implies that a woman with material resources should be seen by her in-laws as independent of the customary obligations to her including at the death of her husband. It also means not being subjected to customary practices of inheritance either in the division of property which the in-laws did not contribute to nor to levirate. As an independent woman she would not need the 'protective covering' of a clan member. This would ultimately mean independence from the clan.

The professions of the widows gave them an income (Respondent 9, 11, 12), which they pooled together with their husbands to acquire property. They clearly perceive their income as personal and as contributing substantially to the family assets. Thus Respondent 9 could say *'we both earned,...I considered that the property belonged to both of us...we started building.'* Respondent 11 could also say *'we started the business together with the resources we both had...we...acquired everything together.'* Respondent 12 said *"we bought the other two pieces of land...I had a small business which belonged to us..."* The widows conceptualise the property as *'family property'* having belonged to both husband and wife during the lifetime of the deceased and now as belonging to the wife at his death regardless of where it is located. Respondent 2 said *'The in-laws then.....agreed not to touch my house and the property in the house.'* Respondent 11 said *;"...my house is built within my late husband's clan's home.'* Consequently they sought to assert rights as *individuals* against those who sought to trespass on property which they *perceived as theirs*.

The experience of Respondent 5 is slightly different. Her level of education is quite low and she does not speak of making a contribution to the family property before her husband died. Nevertheless she speaks of "*our few belongings*" and took steps to protect the residential house when her in-laws sought to deprive her of it. Her perception of the property is no different from the women who had made contributions. It is a family unit property. Her contributions are made after her husband's death when she obtained a loan, started a small business and as a result completed building the residential house. The death of her husband meant that the house was now hers to complete and to also protect from her in-laws whom she considered *outsiders*. The experience of Respondent 5 generally reflects that of widows in the urban area who had low levels of education, no profession, and whose property were divided by the clan. The urban environment provides the opportunities to engage in some form of business. This generates a continual flow of income that enables them to afford the services of a lawyer. Respondent 12 spoke for women in urban centres of whom she said "*can and do acquire property which they can then protect when there are disputes.*"

What is significant is that, it is not so much whether a woman has made contributions to the family property that makes her strive to protect it. Rather it is *her perceptions of herself as wife of the deceased* together with whom they had *shared* a matrimonial home. What was in the home was *theirs as a family unit*. The death of her husband meant that she was now left in charge of the matrimonial home which she *perceives as hers* by virtue of being wife of the deceased. The contributions she has made to the acquisition of the family property strengthens her rights in the property.

7.2.3 Choice of forum

The availability of a wider choice of forums in urban areas as opposed to the rural means that a widow can pick and choose to suit her interests and needs and she often does so successfully. Figure 7.2.B illustrates her choices and interactions with the forums. There is quite a difference with Figure 7.2.A which illustrates the experience of rural widows. Note that the urban widow is not enclosed in the clan, though the clan may have tried to or did interfere. The interference was minimal or not effective or there was none.

The change in the nature of property found in the urban environment also means that choice of forum often changes. Armstrong (1995:5), found this to be the case in WLSA study. She observed that ;

" We are no longer just talking about agricultural fields, grass huts, and farming implements (or animals). People have freehold land, brick houses, modern furniture, bank accounts and cars."

The main consequence of this is that ;

" As ownership has become more individualised, and needs more individualised, some of the group orientation (*extended family obligations and control*) of the customary law has trouble responding. Instead people pick and choose from the customary law, and from general law, in ways that suit their own needs and interests." (Armstrong)

The level of education of the urban widows in Masaka and their professions and that of their deceased husbands and their involvement in business enterprises combines to locate them within an environment where the nature of most property is not traditional as those in rural areas and where ownership is more *individualised*. It is also an environment where the formal administrative and legal forums are generally located thus giving them the benefit of more choices especially the more formal structures. The location also cuts down on travel cost for urban widows something which is a set back for rural widows who are often several miles from the formal courts. They can

generally ensure a continual flow of resources to meet legal fees. Their location in the urban areas also means that they are located away from clan stronghold and therefore not under constant scrutiny or possible intimidation from the husband's clan unlike the majority of widows in the rural areas. This means that on the death of a relative living in an urban area, the relatives in the rural area would have to travel to the home of the deceased in the city. This can be costly and the majority would not be able to afford it. It is also a cultural practice to bury the body of a deceased in his village in the rural area. This often means transporting his body from the urban area to the village. These circumstances work to reduce the strength of clan opposition to urban widows' resistance to cultural demands. Figure 7.2.B reflects this. Figures 7.3 and 7.4 which combines both urban and rural choices reflects their wide choice of forums.

7.2.4 Independent Existence

As already noted, at the *ideological* level, customs and their practices are deemed to apply to all members of the kin regardless of their location or status. However its *practical* application or efficacy may be determined by those factors revealed in the experiences of the urban widows described above.

In the circumstances of these widows one can hardly ask the question; '*to what extent do the forms of conjugal, familial and kinship relations allow her an independent existence so that she can assert rights as an individual against individuals?*' (Whitehead 1984:189-190).' The interviews reveal that a widow, by virtue of her educational level, the work she is engaged in, her relationship to her late husband in for example their joint accumulation of family property, her physical location, her perceptions of herself, had already acquired *an independent existence* from the husband's clan during his life time. In contrast to the rural widow, she is not embedded as it were in his clan. She conceptualises herself as a fully acting subject or as having a

right, a better right, in the family property in its ownership, control, use and management, than other persons during her marriage except her husband and continues to do so after his death. Respondent 11 was encouraged by her husband to deter his relatives from troubling her and to ensure that she, not them, got the right to administer the property. In essence he was encouraging her to protect her independent existence. In their conjugal relationship he treated her as having an equal right with him in their family property as seen in their joint acquisition and use of their assets. This was also the case with Respondent 9 and 12 and their spouse. They made important decisions together and contributed from their personal earnings to acquire property.

It is significant to note that none of the urban widows talked of the '*omusika*/heir.' While it is rare for an heir not to be chosen by the clan, it would appear this was not an issue. The widows were in control of their deceased husbands' assets.

7.2.5 Conclusion

Middle class propertied urban widows portray themselves as assertive, independent and progressive individuals who know that they are. Not only do they generally ensure their legal possession of the property but they also take decisions about their property, improving on it and using it as they see fit. Their location in an urban environment also means that their resources are more and also more varied from that of rural women and ensures their independence from the clan thus discouraging their interference. In view of these more favourable set of circumstances, rural widows can be seen to be as assertive if not more so having more obstacles to overcome like living within clan stronghold, their lower level of education and lack of knowledge of the formal courts. What appears to be a very strong factor in ensuring widows in both the rural and urban areas their successes in retaining or claiming property is the presence of a forum/forums within their local context, outside the clan, that is empowered by statute

to arbitrate in inheritance matters. These forums are generally *sympathetic* to the plight of widows. They encourage widows to assert themselves by giving them a *voice* and *protection of their actions whether to claim property or to legalise a right in it*. It is important to note that from the onset widows *perceptions of themselves as individuals with rights* which they believe they are entitled to. This is what motivates them to assert themselves and so to a large extent control their fate (Ncube et al: 1995: 35-36).

The resource position of the widows also vary with urban widows having more material resources and personal skills. However rural widows also use their personal capabilities to assert themselves. *This calls for a wider definition to resource positions and seeing it not only as material but also personal abilities* (White Ph.D 1988, Bentzon et al: 1998).

The conflicts that can and often does take place in the relationships between the widow, the in-laws/ clan and various forums when she asserts herself is explored in greater detail in the following Chapters 8 and 9, where the dispute starts with the clan and ends in court.

A Sample study of widows in Rakai District : March to May 1994							
Respondent	Current Age	Religious Affiliation	Forum of marriage	Age at Marriage	Level of Education	No of Children	Year husband died
1	23	Catholic	Customary	13	Level 7	2	1985
2	24	Adventist	Customary	16	Level 7	2	1993
3	27	Catholic	Customary	17	Level 8	3 (2)	1992
4	27	Catholic	Cohabit	20	Level 5	3	1993
5	27	Catholic	Customary	23	Level 3	4	1992
6	28	Catholic	Church	22	level 7	2	1993
7	30	Catholic	Customary	18	Level 6	5	1989
8	34	Catholic	Church	16	Level 7	7	1992
9	34	Catholic	Cohabit	18	Level 6	5	1989
10	35	Catholic	Church	20	Level 7	6	1987
11	40	Catholic	Customary	17	level 4	10	1992
12	42	Catholic	Customary	19	Level 5	4	1963
13	42	Catholic	Customary	19	Nil	6	1980
14	42	Catholic	D.C	21	Teacher Tr	3	1979
15	45	Catholic	Customary	14	Level 4	4	1992
16	48	Catholic	Customary	18	Level 8	6	1972
17	50	Catholic	Customary	17	Level 2	8	1980
18	58	Catholic	Customary	17	Level > 1	3 (4)	1992
19	60s	Catholic	Church	15	Level 6	1	1993
20	70s	Catholic	Church	18	Level > 4	5 (1)	1977

Key

Brackets....Children dead

Levels of Education

1-7.....Primary level

8-11.....Secondary

Others....Above Secondary

APPENDIX : 7.1.A

A Sample study of widows in Rakai contd.							
Respondent	Cause of death	work status of widow	work status of husband	Testate	Intestate	Property Left	Forum of Settlement
1	Hiv/Aids	Cultivator	Cultivator	x		H, La	CI
2	Hiv/Aids	Housewife	Civil Serv.		x	La,Veh,HP	CI,Rc,P,PO
3	Hiv/Aids	Business	Business	x		H, La	RC,PO,Fa
4	Hiv/Aids	Cultivator	Market Ve	x		La,HP	CI,Rc,cr,Po
5	Natural	Cultivator	Business	x		C,La,S,Veh	CI,RC,PO
6	Hiv/Aids	Cultivator	Builder		x	H,La, HP	RC,PO,CI
7	Hiv/Aids	Cultivator	Business		x	La,S,H,HP	RC,PO,CI
8	Hiv/Aids	Cultivator	Business	x		H, La	CI,
9	Hiv/Aids	Cultivator	Hotelier		x	L,HP,H	CI
10	Hiv/Aids	Cultivator	Headmaster		Oral will	H,La,	CI
11	Hiv/Aids	Cultivator	Headmaster	x		H,La	CI,RC
12	Natural	Cultiv / RC	Business		x	HP,La	CI
13	Natural	Cultivator	Cultivator		x	HP,La	CI
14	Killed	Cultivator	Military Off.		x	Veh, La, C	RC
15	Hiv/Aids	Cultivator	Business	x		H,La	CI,RC
16	Suicide	Cultivator	Taxi driver		x	HP	CI
17	Natural	Cultivator	Manager	x		H,La	CI
18	Hiv/Aids	Cultivator	Business	x		H,La	CI
19	Natural	Cultivator	Shoemaker	x		S,H,La	Fa
20	Killed	Nil	Herdsmen		x	H,C,La	CI

Key

HP....Household Property

Veh...Vehicle

S.....Shop

La.....Land

Cl.....Clan

Fa.....Family

H....House

C....Cattle

cr....Court

RC....Resistance Council

P.....Police

PO....Probation Office

APPENDIX : 7.1.A (continued)

A sample study of widows in Masaka town Jan-March 1994							
Respondent	Current Age	Religious Affiliation	Forum of Marriage	Age at Marriage	Level of Education	No. of Children	Year husband died
1	26	Muslim	Mosque	12	5	4	1988
2	28	Catholic	Mosque	22	Nurse	3	1989
3	29	Muslim	Customary	18	4	5	1993
4	30	Muslim	Mosque	18	11	4	1991
5	32	Muslim	Mosque	18	7	6	1989
6	36	Catholic	Church	26	11	4	1990
7	40	Catholic	Customary	19	3	6	1991
8	42	Catholic	Church	16	Nil	6	1986
9	42	Catholic	Church	22	Vet. College	5	1984
10	42	Catholic	Cohabit	20	9	7	1989
11	44	Anglican	Church	22	Teacher. Ti	9	1992
12	45	Catholic	Church	22	Dip. Educ	7	1989
13	48	Catholic	Customary	24	8	6	1987
14	50	Muslim	Mosque	12	Nil	13	1980s
15	50	Catholic	Church	13	3	7	1979
16	57	Catholic	Church	29	8	7	1979

Levels of Education

1-7..... Primary level

8-11.....Secondary

Others..... Above Secondary

APPENDIX : 7.1.B

A Sample study of widows in Masaka continued.							
Respon- dent	Cause of death	work status of widow	work status of husband	Testate	Intestate	Property Left	Forum of Settlement
1	Hiv/Aids	Business	Cultivator		x	HP	Cl, Fa
2	Hiv/Aids	Business	Business		x	H,HP,Veh,	Cl,Fa,cr,Ly
3	Hiv/Aids	Cultivator	Cultivator		x	HP	Cl, Fa
4	Hiv/Aids	Cultivator	Business		x	HP	Cl
5	Hiv/Aids	Business	Business		x	HP,La	RC,AG,Cr,
6	Hiv/Aids	Business	Vet Doctor	x		H,HP,Veh,L	Cr,Ly
7	Hiv/Aids	Cultivator	Cultivator		x	La, H	Cl
8	Natural	Market	Marketing		x	HP	Cl, Fa
9	Natural	Vet Officer	accountant		x	H,HP,La	RC,AG,Cr,
10	Hiv/Aids	Business	Mechanic		x	H,S	Cl
11	Natural	Business	Teacher	x		H,La, S	cl,AG,Ly,cr
12	Natural	Business	Teacher	x		La, S	Cl,Cr,Ly
13	Hiv/Aids	Business	Business		x	H,HP	Cl,Fa,
14	Natural	Cultivator	Cultivator		x	La	Cl
15	Natural	Poultry	Business		x	HP, S	Cl
16	Natural	Business	Diplomat	x		H, Veh,S	Cr,AG,P

Key ;

HP...Household Property

Veh.....Vehicle

S.....Shop

La.....Land

Cl.....Clan

Fa.....Family

Rc..Resistance Council

AG...Administrator General

Cr.....Court

Ly.....lawyer

H...house

P.....Police

Experience of a rural widow

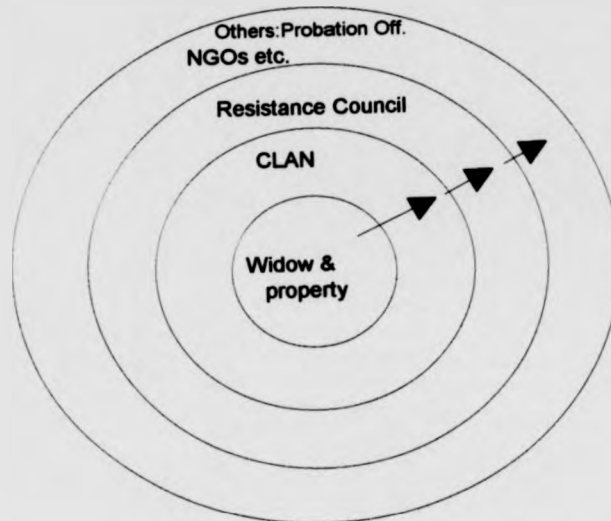


FIG. 7.2.A

Forums that widows in rural areas generally use to claim property.

- * Note that the widow and property are embedded in the clan. clan divides property then the widow seeks to assert her claim.



Experience of an urban widow

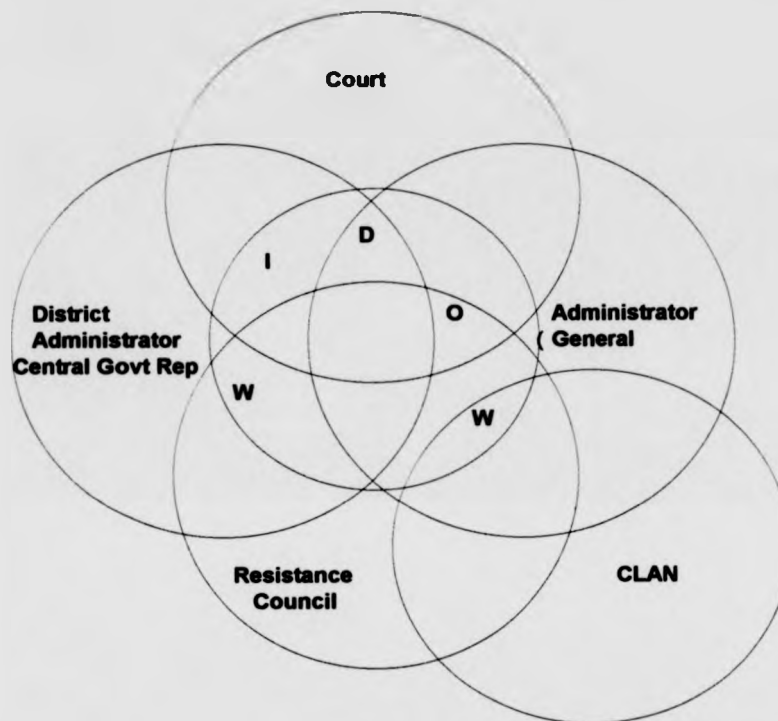


FIG 7.2.B

- Forums that widows in urban areas use to legalise their rights in property against claims from the clan/in-laws.
- widow is in centre with property
- Note: the widow and property are not enclosed in the clan as rural widows in Fig 7.2.A
- Note: The interaction between the forums

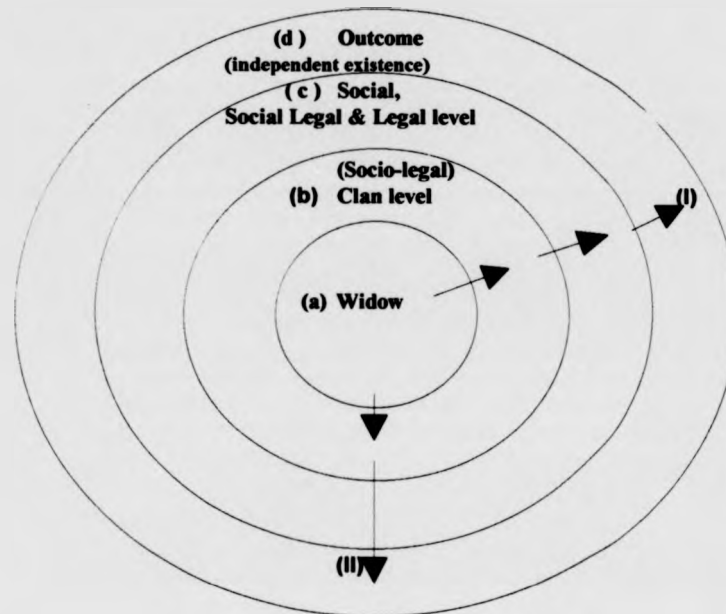


FIG. 7.3

KEY

- (a) Widow (rural or urban)
- (b) Clan is guardian of culture, custom and traditions. The Widow is embedded in the clan. Interaction inevitable.
- (c) The court, Administrator General, District Executive Sec. Resistance Council and others eg Probation office and Ngos. The widow interacts with any, some or all by choice or circumstance.
- (d) Outcome for the widow

Pathways the widow uses to assert her claims.

(I) Disputes and settlement; most frequently used.

(II) Willingly given property by the clan: rarely happens

Widows and claims to property: 'Uncovering the passive victim'

Widowhood and property

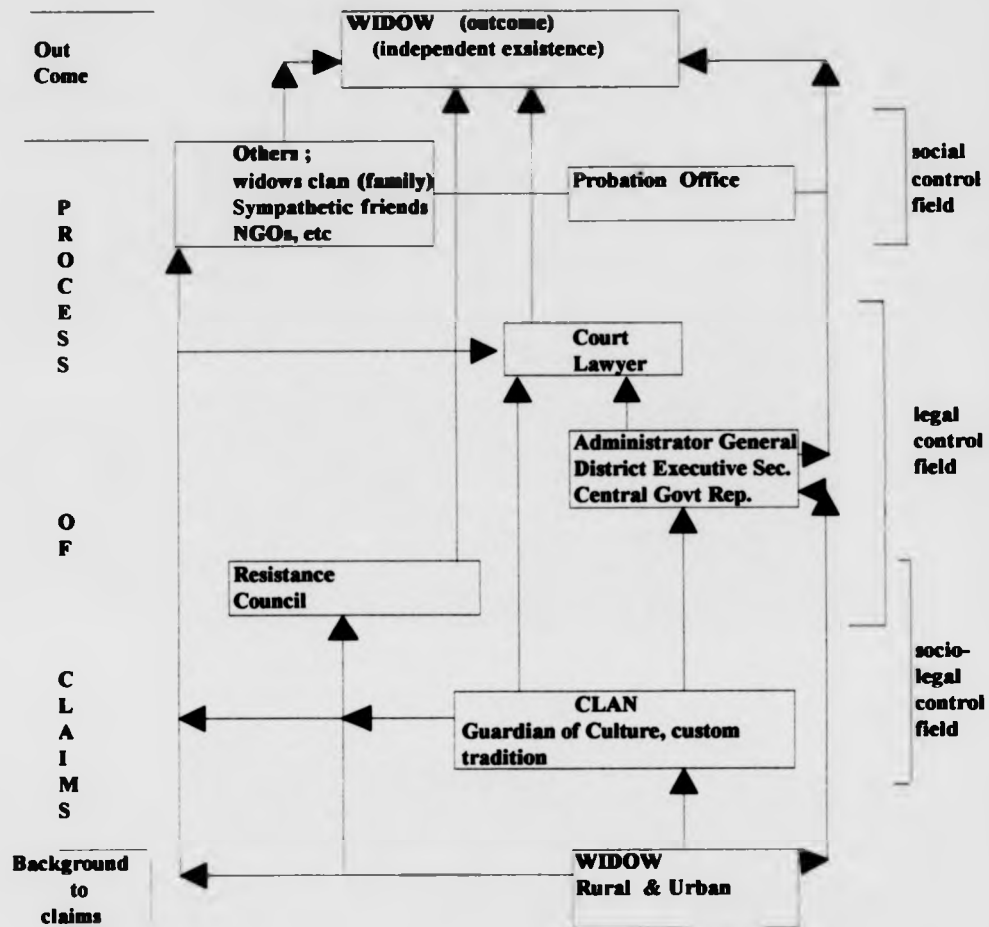


FIG. 7.4 choice of pathways widows use to assert their rights

CHAPTER 8

WIDOWS WITHIN THE SOCIO-LEGAL AND LEGAL PROCESS.

"Women pick and choose between the systems and some times they use both simultaneously in an attempt to further their interests." (Armstrong:95:160)

"However, whether or not a woman will actually exercise such an option is not merely a question of choice but of how she perceives herself and the range of practical options that are open to her." (Donzwa et al 1995:106)

8.0 Introduction.

In the previous chapter there was emphasis on the experiences of rural and urban widows at inheritance when property settlement is made for the beneficiaries of the deceased. It revealed how their perceptions of themselves as individuals within family relationships and their perceptions of the property as family unit property motivated them to take action according to their individual circumstances and interests to ensure their share of property. It also revealed their choice of forums to assert their rights. The chapter uncovered the 'active status' of a woman at widowhood where she is generally presumed to be subordinated and therefore a silent and 'passive victim' of decisions concerning herself.

The main focus in this chapter is on the relationships between the forums and the widow and the role she plays as she moves between them to claim property. The place to capture the interplay between the relationships is within the *process* of dispute settlement where one sees the widow and different forums drawn together because of their various interests and roles. An underlying theme will focus on the struggle taking place between the forums and their interpretations of each other as a widow moves between them.

The previous chapter revealed that the RCs played a major role in assisting rural widows to assert their rights. It also highlighted the relationships between the RC and the clan especially the fact that clan members are sometime members of RCs and the

impact of this on a widow's ability to assert her rights. It was revealed that rural widows rarely use courts, except where the RC has not dealt with the case successfully and the widow has the means to proceed to court. Nabakooza's case which is selected for examination in this chapter brings all these issues to the fore and reveals the extent to which a widow will pursue her rights in these circumstances.

The previous chapter also revealed that propertied urban widows generally have a wider choice of forums in which to assert their rights. It was also revealed that the influence of the clan at inheritance is generally quite reduced in the urban area because of various factors such as the law to which urban dwellers generally turn, the resource position of widows which encourage them to be more assertive and also property is generally located within urban area and away from clan land. Regina's case reveals the impact of these various factors on a widow's rights to property.

The data used in this chapter are from the court proceedings of Nabakooza's and Regina's cases. These court records are used to supplement the field interviews.

Strauss (1987:26) has said this to clarify what is meant by data collection;

"There is some ambiguity associated with the term data collection. Many social scientists do generate their data through field observations, interviewing, producing videotapes, taping proceedings, and so on. *Butthere are other sources of data: published documents of all kinds and private documents like letters and diaries.*" (emphasis mine.)

Strauss(1987:27) observed that these are 'valuable sources of data ' which can be used *'to supplement a series of interviews. We call these "slices of data " for different kinds of data give different views or vantage points...."* He also stated that it allows for further discovery of relationships among the categories that are entering into an emerging theory.

Nabakooza's and Regina's case which were in loose leaf in the chief Magistrate's court in Masaka reveal more about the relationships taking place between the regulatory

regimes and a widow's struggle with the choice options available to her. The research method with the use of interview of widows meant that the interviewees offered *their* version of the story according to their perception. The persons they spoke about were not interviewed because that was not in the research methodology. This means that only one side of the story has been heard. The purpose of the use of court records is to, as it were, hear the two sides of the story that is, from the widow and the actors in the forums she selects. This gives a detailed reflection of some of the struggles that a widow faces when seeking to assert her rights. Through the details provided in the verbatim reporting of the court trial in Nabakooza's case, the process that a widow goes through, the obstacles that she faces are uncovered and the extent to which she can assert herself and the forces which are enabling or constraining to her are better understood.

The urban case (Regina's) highlights rural-urban similarities and differences. Although it is not as detailed as the rural case it provide insights into the differences in the relationships between the forums in the urban as opposed to the rural and what this means for the protection of the rights of the widow and the extent to which she can assert her rights where there is dispute. This case also differs from those of the widows interviewed in urban Masaka. It is a case that brings the main forums (the clan (*family, in-laws, beneficiaries, relatives, decision makers*), RCI-RCIII, the DES, the AG, the court(*lawyer and Magistrate*) together and gives insights into their working relationships and what this means for the rights of widow. None of the cases in the interviews brought the forums together in this way.

8.1 Case one: The widow and property in the rural area.

The proceedings in this case draws on evidence from the widow, the RCs, the clan, the District Executive Secretary (DES) and concludes with the chief Magistrate's judgement. The case draws this research into an arena of interactions where the various parties to the conflict reveal their perceptions of widowhood and manipulate the legal process to try to achieve their goals. The conflict began outside the legal forum in the village with the clan and RC. The widow draws the various forums into court especially the clan and RC which are most influential at grassroots. The whole process reveals the extent and the limits of powers of individual forums in areas where power is shared, as at inheritance.

A summary of the case is given to highlight the issues around which the disputes revolve and excerpts of the actual statements of the parties are quoted from the court record during the course of the analysis.

Administrative Cause No. 24 of 1992 at Masaka Court.

S. Kagimu and others (the plaintiffs). v .Teddy Nabakooza (the defendant).

According to the facts of the case, the plaintiffs, Kagimu (*brother of Kabuye the deceased*), Nagayi (*sister of the deceased*) and Kibirige (*father of the deceased*) jointly sued the defendant Teddy Nabakooza who had two children with the deceased for orders that the Letters of administration (hereafter the Letters) to the deceased's estate granted her by the court be revoked and in the alternative probate granted to them. The plaintiffs claimed that the deceased who died on 15/2/92, died testate, having appointed them as executors of his will, in the presence of RC1 chairman and an executive member. That according to the will, the two children, a son aged eight and a daughter that the deceased had with the defendant, were bequeathed a *kibanja* (small piece of land) in the village not far from where the defendant was residing in her personal home. The deceased also had five other young children, all females with different mothers to whom he had bequeathed the main residential house at Kirimya village. This house was to be looked after by the deceased's mother as caretaker/trustee. She was to rent it to generate income for the care of the five children. The deceased had not appointed an heir in his will, neither had he chosen his only son, aged eight, because his son was already heir to the estate of his brother who had predeceased him and also "customarily a person cannot be a successor to two persons". Consequently the family of the deceased had installed the son of Kagimu as

heir. The mother of the deceased decided that renting the house would make it depreciate quickly, so contrary to the will of the deceased, she decided that Kagimu should live in it with his son and Kagimu did so.

According to the will, the heir was to take over another house of the deceased at Bisanje. However the family(clan) of the deceased decided that this said house was to be rented instead and the income used to assist the five children. In any case the heir was going to be living in the main residential house at Kirimya with his father Kagimu. The plaintiffs testified that the deceased did not name a widow in his will neither did he leave any property for the mothers of any of the other five children. They revealed that although the defendant claimed to be the deceased's wife there had never been a church wedding. She had left him when he fell ill and was not with him at the time of his death. Also, while they were making arrangements to apply for probate, the defendant had fraudulently and without consulting them, applied for and was granted letters of administration by the court.

The case for the defendant was that she and the deceased had lived together for ten years as husband and wife and they had acquired property together. At the time of his death she was not at his death bed because when he became seriously ill, he was taken by his family to die in his village. She was also not on good terms with her in-laws because they had wanted to sell the deceased's property before he died. The defendant admitted that the will was read out in her presence and it purported to give her a banana plantation where, according to her, there was none. The children she had with the deceased were not given a house.

A week later, after the reading of the will, she reported the matter to the District Executive Secretary(DES), who is the representative of the Administrator General at District level. She also got a letter from the District Administrator(DA). The DES advised the deceased's family to distribute the property equitably among the beneficiaries. He arranged to be present at the said distribution. On the occasion of the meeting, the deceased's family refused to distribute as per the undertaking. Consequently the DES advised the widow to apply to court for the Letters which was granted her. She took the Letters to the RCs of the area where the property was situated to inform them of the Court's decision and to seek their assistance in the implementation of the order. The RCs summoned the in-laws and informed them of the courts decision. The in-laws then decided to appeal against the decision. According to her own testimony, she was afraid that she could be infected with the disease (HIV/AIDS) which her husband had died of and when she died, her children who had not been given property by the clan would face hardships while Kagimu and his children would be living in her deceased husband's estate.

The court decided that the widow be given Letters of administration of the deceased property on behalf of all the seven children who were granted the inheritance. However the plaintiffs were also given powers of administration of the estate of the five children with the widow in recognition of their customary roles as guardians (*abakuza*). The RC where the property was situated were given supervisory powers in the implementation of the court decision.

8.1.1 The widow within the legal web.

The legal process involves a set of activities and Nabakooza moves back and forth from the legal to the cultural forum to assert her claims. It is however necessary to keep in focus that the average woman from a rural area would be illiterate, resource poor and time constrained, and often living great distances from the location of the nearest court.

What follows is an account of the relevant procedures through which a person applying for legal rights to a deceased's estate is required to go.

The procedures for applying for the grant of probate or Letters of Administration are provided in the Administration of Estates (Small Estates) (Special Provisions Decree, 1972, hereafter the Decree, and the Administration of Estates (Small Estates) Probate and Administration) Rules, 1972, hereafter the Rules

A significant factor in the application for grant of Letters of Administration or probate is that, *prima facie*, any person who is a beneficiary can apply and that includes a widow contrary to cultural ideology and perceptions where she generally has no right in administration. It is the duty of the court (Rule 3(2)) to determine the right of the applicant to apply and this in turn is determined by the category of persons to whom the court is enjoined by law to grant the Letters of Administration under Rule 9. According to Rule 9 (1) grant of Letters of Administration is in the following order of priority;

- (a) The children of the deceased
- (b) The surviving spouse or
- (c) The father or mother of the deceased

(d) brothers and sisters of the whole blood or the issue of any deceased brother or sister of the whole blood

(e) The issue of any such child of the deceased.

If there is no person in any of the group of persons mentioned in paragraphs (a) to (d) then other relatives including grandparents and uncles and aunts of the deceased are entitled (Rule 9(2)). The priority in Rule 9(1) is based on the provision in the Succession Act as amended (section 201) which provides that the Letters be granted to the beneficiary entitled to the greatest share of the estate. Under section 28(1)(a) of the said Act, children are entitled to the greatest share, 75% followed by the surviving spouse 15% and in polygynous unions the same amount is to be divided among the surviving wives. The court can however use its discretion in varying the order of priority, a discretion exercised in Nabakooza's case when it granted her the Letters that led to the litigation. This is generally in cases where the children are minors (below the statutory adult age of 18 years). Sometimes a deceased may be survived by a widow and several children. When the 75% is divided between the children, the widow with her 15% may end up with the greatest share and so is given priority and granted the Letters of administration. It would appear from court record that Nabakooza had satisfied the basic requirement of naming the beneficiaries (the deceased's 7 children) in her application and finding that they were minors, the court granted her the Letters.

The law clearly emphasises the right of the children and the surviving spouse or spouses (wives in a polygynous union) against all others in the administration of the deceased's estate. The surviving spouse is conceptualised by the law as having more rights for purposes of grant of Letters than the relatives of the deceased, contrary to cultural ideology which emphasises the principal heir and children and male relatives (*abakuza*) of the deceased. The recognition of the priority of the children by the law is

based on the principle of "the welfare of the child" embodied in the laws of the land through the Constitution of the Republic of Uganda (1995 Article 34). It is also compatible with cultural perception of the importance of children to the clan. However the priority given to a wife or wives over the *omukuzal* guardian to administer his estate in the event of the children being minors or where there are no children is contrary to cultural ideology as elaborated in the case of Re Suleiman Salongo (1972) ULR. The law clearly recognises that a widow is an individual with rights, a better right than her in-laws and also separate from theirs. It is the clan that does not recognise this separate right. Interviews with legal officers in the Administrator General's (AG) office revealed that in most cases a male relative of the deceased will accompany a widow to apply for the Letters. As a compromise by law and sometimes in recognition of the cultural role of men, a male relative is made joint administrator with the widow, with the consent of the AG as he sees fit. These are generally instances where the 'heir' to the deceased's property is a brother or uncle of the deceased. The widow and the 'heir' are then both made joint administrators. A look through court files (administration of estates) in Masaka court revealed that in 1994 only 13 out of 189 applicants were widows applying as *sole applicants* and made *sole administrators* of the deceased's property. The rest of the cases were brothers/sisters/uncles/children/mother of the deceased, applying with or without the widow. They would normally come as persons appointed by the clan or the deceased in his will to administer the deceased's estate. In applying as joint applicants with the widow or applying without the widow, the relatives of the deceased are insisting on the status quo. To them, a widow is subordinate to the clan and is not *an individual* with *separate rights* entitled to have authority over the estate of her husband. He is also from another clan. She cannot be seen to have authority over the estates of another

clan. Her 'rights' are perceived as being incorporated into that of the clan and she can only have the benefit of the rights by being subject to the clan generally through levirate or other agreed arrangements with the clan as evidenced in the findings, except where there is resort to the law.

8.1.2 Separation of powers of RC and clan

The experience of Nabakooza with the forums reflects the interactions between these forums. Each forum has its own set of rules and norms. The case reflects how the forums separately or corporately seek to coerce or enforce compliance to their rules in what they perceive as their areas of autonomy (Falk Moore 1978:56-58). The effect of this is the over lapping in their activities, as various forums support, ignore or frustrate one another and try to reach a settlement, resulting in unpredictable patterns of interaction, negotiations and conflicts (Griffiths: 1986:38).

The first issue that emerges in Nabakooza's case is the determination by the forums of which of them has responsibility for inheritance at grassroots. Earlier discussions showed that the clan and RCs are at grassroots with the DES having supervisory powers over the RCs (RC Judicial Powers Statute 1987) and by implication also over the clan. The perceptions of the clan and the RC of the role of the DES is reflected in the statements below. The perceptions reflect the relationship between the clan forum and the RC forum. One of the witnesses for the plaintiffs who was RCI chairman said of the widow in his testimony in court ;

"I am chairman RCI, Kirimya village. She came to us as RCs. We did not feel like entertaining the matter. She had been sent by the DES to settle her problem. We (the RC Executive) wrote (to the DES) saying this was a family dispute which could be solved by clan members" (emphasis mine)

The chairman went on to say about the deceased (*Kabuye*) before his death but while he was ill ;

"Kabuye told me in the presence of all those present that he had made a will which he wanted me to witness. He was very mentally alert. I asked him how many children he had. He said 7. I asked him about his property and he said he had a kibanja at Kirimnya, Kawoko, Serinya and Bisanje. I did this before he gave me the will to read through to confirm that he knew what he was talking about. Kibirige (*Kabuye's father*) read through first. I read through myself and was satisfied that he had given all the children. I am *head of a clan* so I cannot sign as witness unless the testator has provided for all the children."

The *RCI chairman* revealed that he was *head of a clan (not of any parties in dispute)*.

He had *two* roles of responsibility both of which wield authority and carry considerable weight at inheritance. These two roles reflect two forums at grassroots, where disputes are generally decided. The RCI Chairman can decide a case in his capacity as RC executive member when the RC forum is sitting as court. He can also decide a case as Head of his clan when the clan is sitting as a family council. In the previous chapter it was revealed that widows sometimes face the problem of interested parties. Within these set of circumstances one may find that a person wears the hat of a clan elder and RC executive member as in the case quoted, or is a relative of one of the parties in dispute.

These roles reflect different levels of interactions within dispute settlement. Fig 8.1 in the Appendices reflects the interaction between the forums. At every level there are persons who hold responsibility and are in the fore front in the dispute settlement. This is reflected in Figure 8.2. In the *rural areas* where the RCs and the clan are in close proximity and more often than not interwoven in practice and ideology, there may be a blurring of the roles of responsibility of the clan and the RC, irrespective of whether the forum sits as RC or clan. In general however, the established customary role of the clan at inheritance is recognised and respected by the RCs. This is reflected in the statement of the RCI chairman quoted. The RCs can rise above these conflicting levels of relationships where the occasion is called for. The experience of rural widows in Chapter 7 reveal instances where a RC settled a dispute in favour of a widow rather

than the clan. This interaction between the RC and the clan reveal the complexity of their semi-autonomy. Their similar methods of dispute settlement means that they can support and complement one another. At times it would appear that the RC is 'absorbed' into the clan so that there is no question of semi-autonomy but rather the two acting as one autonomous body against interference from outside (RC and clan against the DES). The action may be seen from outside as purely that of the clan because the clan is generally known to handle customary disputes. Yet from within the merging of the two forums there is a clear understanding between them of their roles, *"We (the RC Executive) wrote to the DES saying this was a family dispute which could be solved by clan members"*. The RC has the executive role and so communicates on behalf of the clan to another executive body. The clan has the administrative role of dividing the property. It is this understanding that allows the two forums a measure of harmony. Nabakooza's dispute at grassroots further reflects this complexity. The RCI chairman supported Nabakooza's in-laws (the deceased clan) because he was head of a clan. His perception of the dispute was seen through his 'eyes' as a member of a clan. As a person from the Baganda tribe, he *belongs* first and foremost to a clan from birth (Roscoe: 1862-1923). The responsibility he has in the RC, he *takes on*. At grassroots, clan relationships are deeply rooted and can be seen to influence any matters that touch the family. Family as already discussed is part of a clan. To have the right to make decisions about clan matters one has to be seen to 'belong' to a clan. Consequently any authority from outside the clan for example the DES, is seen as not 'belonging,' therefore an 'outsider'. The RC chairman who was a member and head of a clan could therefore write to the DES to leave the matter to the clan. However he wrote in his capacity as RC chairman. Note that he does not say to leave the matter to the RC either. Nabakooza had also come with a letter from the DA

under whose overall supervision the District of Masaka comes, including the RC Committees (Resistance Councils and Committees Statute 1987, section 20). His letter was ignored. Respondent 2 (Masaka widow) (Chapter 7) also had a similar experience. The relatives of the deceased (clan) refused to have a meeting with the DA when he invited them. They were willing to reach a settlement when her lawyer involved the RC. The case of Regina discussed further on, reveals that the DES carried out the distribution in the presence of RCs as well as the clan. The other cases in the research were found to have been resolved within the RCs (or in court) without the involvement of the DA or DES. The examples given reveal the overlapping of the structure of the RC and the clan at grassroots and the consequences. The clan is generally more willing to negotiate a settlement when the RC is involved. When the clan is in disagreement with a widow, the RC can intervene in its capacity as RC, therefore separate from the clan. However where the RC sides with the clan, they act corporately, therefore the widow has to seek for intervention from outside.

8.1.3 Decision making between forums at grassroots.

Nabakooza's testimony in court reveals the choices she made and the extent to which she was able to assert her rights in the light of the relationship between the forums. It reflects the ways in which social fields invade each others spheres as individuals move between them and the struggle (by the clan) "to fight encroachment on autonomy previously enjoyed (Falk Moore 1978:80)."

"After one week, I decided to go to the DES. They (*the in-laws*) were summoned and they said they depended on the will. They were told (*by DES*) it was wrong to have my son not being chosen heir (*to his father, the deceased*) or even being given a house. They said the heir (Kagimu's son) had succeeded to blood not to property. They refused to concede to my request that all property be recorded. The DES advised that property be equitably distributed. They made a list of what they considered fair distribution. The DES made arrangements to be present to witness the hand over. I was told to transport DES. Reaching there, they refused to distribute as per undertaking. They gave us the list.

When the DES saw the new list of the purported distribution, he referred me to court. I was advised to apply for letters of administration (*as widow of the deceased*), which I successfully did."

Kagimu the brother of the deceased narrated his side of the story.

"In the course of time the defendant went and complained to the DES that she was the widow and that she wanted property to look after. We were summoned (*by DES*) to go to the site... When they came the DES ordered that the property should be handed over to her. I refused. My father as well. I refused because she was not given power(*by the deceased*) to look after the estate. I was even assaulted."

When cross examined by Nabakooza, Kagimu said ;

"When the DES called us, we disputed his orders... The deceased did not appoint an heir because he knew that his own son had succeeded some other person. That is why he left the matter to us after his death to appoint an heir..... The deceased appointed us guardians.... We signed (the will) as executors."

Kagimu and his father represent the clan forum. The RC1 chairman acted in his capacity as a RC member so he represents the RC forum and the DES represents the legal and administrative forum. Nabakooza as an individual is faced with these choices. The clan and the RC who are at grassroots where she lives and where the property in dispute are located had rejected her claims. She choose to go outside her location to seek for a forum with greater powers than the clan or RC. Her determination and choice was based on *her self perception* as the widow of the deceased and a mother to his son, which according to her, entitled her and her children to a share of the deceased's property. As has been argued so far in the research findings, *a widow's self perception and the choices available play a vital role in the extent to which she can assert her rights* (Ncube et al :35, Donzwa et al 1995:106). Nabakooza also saw herself as an individual and therefore 'wanted property to look after,' a fact she made known to the in-laws. She was also insistent on all the deceased's property being recorded so that it could be presented to the DES who had supervisory powers over the settlement of a deceased's estate. This would ensure her a fair share.

The clan initially appeared to respect the office of the DES during the time the widow was shuttling between them. They however rejected his authority when he appeared at their location to witness the distribution of the property. The clan shifted its resistance from the widow to the DES. Through her actions the widow brought the main actors within the two forums into a sphere of interaction, which turned into an arena of conflict of authority and conflict of interests.

The main struggle boiled down to who had the right to make decisions concerning the deceased's estate. The in-laws perceived it as being done culturally. They emphasised the cultural practice of the appointment of the heir by the clan, which they represented, and to whom the deceased had therefore left this task. The deceased had also appointed them as guardians in accordance with cultural practice. Nabakooza and the DES were therefore interfering.

The DES initially respected the authority of the clan in the distribution of the estate of the deceased and consequently proceeded to exercise his supervisory powers by *advising* the clan and left it to *them* to make a list of what *they* considered fair. The DES is in a unique position to mediate between culture and the formal law. He is therefore well placed to see and understand how on one hand the clan functions and on the other the law. In his perception, the clan does not have absolute powers over the deceased's property. Action could be taken against unfair distribution to the beneficiaries. He therefore ordered them to give Nabakooza some property. He discovered that he could not enforce his orders at grassroots therefore advised the widow to go to court. This has its implications.

The success of the clan in defying the DES was a result of a number of factors. The DES was taken to the site of the property. This meant the locality in the 'stronghold' of the clan where they make decisions and implement them according to their ideology

and practice. The evidence in the court record did not indicate whether there were other persons at the site except the parties named. However, at the distribution of the assets of the deceased, the clan elders who have this responsibility and the beneficiaries whose presence is required at the distribution are usually present (see Regina's case). They were in familiar surrounding where cultural practices find their strongest means of expression and with the most likely presence of other clan members. This strengthened their defiance. On the other hand the DES was acting as a representative of the AG and without the power to enforce compliance. The DES was also physically away from the courts or the AG's office, and as it were, away from the 'stronghold' of the legal and administrative forum which he represented. It was necessary that he turned to these forums who had the powers to enforce compliance. Consequently he advised Nabakooza to go to court. Through this conflict the clan with the support of the RC had asserted its authority at grassroots and its claim to authority at inheritance. This situation clearly reveals that *the legal and administrative authorities are not accepted at grassroots as long as they are not subject to cultural rules*. These interactions reflect Falk Moore's assertions about the nature of semi-autonomous fields (1978:57-58). The clan as a rule making body has its social arrangements for the family and there are binding obligations on its members. Members owe their allegiance to this rule making body to which they belong (*from birth*). The DES and the legal and administrative regulatory regimes are impositions which are meant to alter the administrative powers of the clan as a rule making body and sometimes to alter the social arrangements as for example, giving a widow property when this is not according to the rules of the social arrangements. To give her property would be to deny those who are culturally entitled. Conflict is therefore inevitable. The widow as an *outsider* to her husband's clan had no allegiance to that clan so she could fight the

social arrangements which she perceived as seeking to deny her a share of the property. The clan and the DES have spheres where they are most effective and influential. For the clan, it is the rural area where cultural practices are prevalent. For the DES it is the urban areas where cultural practices are watered down and consequently the imposition of new ideas or rules more easily acceptable. The DES had tried to impose his rules where there was no support. He therefore turned to his sphere of influence where there is support from the law. The DES is perceived by the clan and RC as having merely supervisory powers which powers are also subject to the clan, thus the refusal by the clan to obey their orders. The DES can however exert some influence into the situation as illustrated but generally does not resort to use of force to ensure compliance. The same applies to the DA who is the political head of the district. As discussed in Chapter 4, the policy of the NRA/NRM in the creation of the RC system is to give power to the people and to create harmony with the State. The two highest political and administrative offices in the district cannot therefore be seen to create antagonism between the ordinary person and the State. The DES however has the more difficult task as he has more frequent contact, often in dispute settlement.

8.1.4 The widow and the clan

Nabakooza was in conflict with the husband's clan to whom she had been subject during their relationship. Taking her case to the DES and then to court indicated her reluctance to continue being subject to the clan and therefore cultural practices. She was also putting the DES and the court above the clan. In so doing she alienated herself from the RC who perceived the clan as having the authority. She had also alienated herself from the husband's clan who were in possession and control of the property. The support of the DES was therefore inevitable. Consequently on the day of

the distribution of the property the presence of the DES was necessary. She had to ensure his presence and support by providing his transport from the urban centre where government offices are usually located. Her efforts were unsuccessful and she had go to court. Nabakooza was compelled to endure the costs and responsibilities that come with seeking for a remedy outside the clan both *ideologically* and in *the physical location*. Courts of law are generally located within urban areas and this often means long distances from villages where the majority of the population live. It is costly in time and money. Dwyer (1984:157) has argued that these factors are a constraint to rural women who are generally resource poor and time constrained. Nabakooza reveals in her testimony that she is a woman with *resources* and this explains the extent to which she was able to pursue her claims.

The transfer of the dispute by Nabakooza to court led to some unpredictable consequences for her and all the parties in the dispute. In the first instance, her interests were served when court made her administrator of the deceased's property. She returned to the clan under the mistaken belief that an authority from the court, that is the Letters of administration, would be a deterrent to the in-laws and also give her the property she wanted for herself and her children. The clan however decided to challenge the granting of the Letters in court. In so doing, they were not only challenging Nabakooza, but as members of a clan, also challenging the law for what they perceived as "encroachment on autonomy previously enjoyed." The law had 'invaded' the sphere of the clan at the 'invitation' of Nabakooza, a person from within the clan environment. The subsequent 'competition and negotiation' reflected in the arguments in court and the court's response reveal how 'new' rules are generated from the existing rules in each sphere to resolve the conflict. It also reflects rules and norms from different fields that support each other.

8.1.5 Who is a widow :the perception of the clan

When Nabakooza returned from court with the Letters of administration, it had clear implications for the clan. The law had recognised her as the widow and beneficiary to the deceased property. They could not defy her because this would mean contempt of court. The clan felt their authority within their locality threatened by an authority which was widely known and respected and which had powers of arrest and imprisonment. This created fear. Their only option was to challenge her before the same authority. Kagimu who had felt confident within his locality and openly defied the DES, adopted a conciliatory attitude in court. He said ;

"We were then told she had applied for Letters of administration. We saw her bringing court papers to RCs. We pray that we go as per the (deceased's) will. We were making arrangements when she sued us. It was a period of less than one month. We had not moved court for probate."

Kagimu was clearly uncomfortable in the court atmosphere. In requesting the court to allow them to settle the matter as per will of the deceased, he was asking for the reinstatement of clan autonomy in the issue before court. Within the formal court atmosphere the clan sees itself treated at par with the widow as it argues its case. This was also its experience with the DES. The role and authority of the clan at grassroots to preside over disputes and make decisions which carry weight is usurped by the court to whom it must give evidence and await a decision. This procedure clearly weakened the strength of the clan to assert its rules. Kagimu pleaded with court that they had not had sufficient time to move court. He wanted to convince court of the legality of their action in 'protecting' the property of the deceased from the widow who had not been given authority by the deceased to administer his property. As noted earlier, handling the deceased's property without authority from the deceased or the court or the AG is

a criminal offence of intermeddling contrary to sections 268-269 of the Succession Act. Kagimu's defence and language was the language of the law. He sought to *manipulate* the court into taking his side and supporting his interests by arguing both from a cultural perspective and the law. He also sought to use the very instrument (*the law*) in which Nabakooza was seeking refuge, to discredit her marital status and so deny her the right to a share in the deceased's estate. According to the Succession Act as amended by Decree 22 s. 31(1)

"No wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household."

"Provided that this section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution."

Also as noted earlier, within cultural practice, a customary marriage is one which is perceived by the clan as subsisting during and at the death of the deceased. These rules from the law and custom clearly support each other. Kagimu's testimony below reveals that he had some informed knowledge of a legally recognised marital status. He and his witnesses therefore sought to prove that on the one hand the marriage was not subsisting when the deceased died, in the alternative there was probably no marriage.

He said ;

"At the time of his death, he *had no wife left*. When he fell sick *the wife left*. It was *not a church marriage*"

His witnesses also cast doubt on her marital status. The RCI chairman said;

"Then the deceased signed (*the will*) and we left the place...He did not *talk about any widows*."

RCI secretary for defence, also his witness said;

"I know the defendant . She *claimed she was the widow of late Kabuye*. I saw her after Kabuye's death.. *This woman came saying the house...was hers*." (*emphasis mine*)

As noted earlier in Chapter 6, the law recognises both customary and religious marriages that fulfil legally prescribed rules. Kagimu, in stating that it was not a church

marriage appeared to be under the often mistaken belief encouraged by church practices, that a religious marriage is the only lawful marriage. His intention and that of his witnesses was to discredit Nabakooza's legal status as wife of the deceased. This would disqualify her from inheriting property under the law. More important however was his statement that she left when he was ill and was not with him at the time of his died. As already noted, this separation could also disqualify her, a fact followed in court decisions .

In the case of Farasia Rwabaganda v. Donato Bahemurwabusha (1978) 10 HCB 244 the deceased married Frediana Bamusikinira in church in 1964 but they separated in 1965. Although they were not legally divorced she never returned to the home of the deceased until after his death in 1977. She wanted some property. The court, quoting section 31(1) of the Succession Act held in Freidana's case that ;

"Since it was found out as a fact that the deceased's first wife had separated and ceased to belong to the same household as the deceased since 1965, up to the time of his death, she would therefore take no interest in the estate of the deceased."

Throughout her defence Nabakooza did not deny nor concentrate on the reasons for her absence at the time the deceased died. Rather she sought to establish before court the nature of her relationship with the deceased and her contribution to the properties in dispute, the role her in-laws played, and her concerns for his children and their share of the deceased property.

8.1.6 The widow and multiple identities

Nabakooza defence emphasises important relationships between her and the deceased and his family. These relationships reflect her multiple identities (Mbilinyi:1992, Meena:1992) which "women exploit... by highlighting certain identities and concomitantly attenuating others according to convenience..." (Maboreke 1996 Ph.D 60). Nabakooza highlights different *identities* (Figure 8.3) in response to different

accusations levelled at her *to assert her rights* in court. She had already successfully used her *identity as widow* to obtain the Letters of administration. Consequently when she was accused of having acted fraudulently in that she was not the wife of the deceased and also of deserting him, she set out to construct her *identity as wife* therefore *widow*, according to her perception.

"Late Kabuye was my husband for 10 years. We produced together 2 children. I was his wife at the time of his death. I looked after him before his death. He loved me in 1983 when he was working in Kawoko. He then brought me to Masaka and we worked together in business when we lived at Leo Bwongererwa's place. We acquired most of the property together.

The deceased told me that he had brothers. That he wanted to give them business. He brought Kagimu(*brother in-law*) and we gave him money and he started business. As for Kibirige(*my father in-law*), there was a last funeral rites at their home. Kabuye had lost a brother. My son was made heir. I saw Kibirige and all the family. I was introduced to him.

While we were still looking after him (*my husband*), my in-laws wanted to sell the kibanja at Kawoko. When they asked him for permission, he referred them to me. I was never contacted."

Nabakooza argued that on the strength of the duration of her relationship with the deceased, the children they had together, the business they established together and her being introduced to the deceased's family, it was sufficient to grant her status of 'wife' and therefore widow. The in-laws and indeed the clan had also accepted her as 'wife' by installing her son as heir.

On the question of deserting him in his illness, she stressed the extent to which she went out of her way to care for him.

"I looked after the deceased. I am the one who took him to Bwanda Dispensary (clinic). I took him to Masaka TASO (*HIV/AIDS Care and Counselling centre*). I even moved in at the centre with my son. I am the one who went to Luzira (*Government Military hospital which generally has drugs*). I bought drugs from Byansi (*private clinic*). Your mother (*also deceased's mother*) was with me in the exercise."

From the facts he had contracted HIV/AIDS and she had gone to great lengths to seek medical treatment for him. The deceased's mother was a witness to this.

Nabakooza then conceded that ;

"I was not present when Kabuye died. We had some misunderstanding (*with the deceased family*) because I refused to allow them (*the deceased's family*) to sell the kibanja (*deceased's land*). He was then taken home (*by his family to their home village*) where he died."

The reason for her absence was the result of a misunderstanding which rose out of her concern for his property. It drove the deceased's family to take him away from her until he died. She had not left him. Nabakooza also implied that as a person who had jointly acquired the properties with the deceased she had a right to protect it.

Kagimu however argued that;

"All these five children were from different mothers. He never made any provision for any of these mothers."

He was implying that the deceased did not consider the other women as 'wives' although he had had children with them, therefore, neither was she. None had come to court to ask for any share,(except Nabakooza). She therefore wanted property for herself. Nabakooza shifted her stand, portraying herself *as an independent and propertied* woman with no ulterior motives;

"I would like the court to distribute the property equitably. The will is a forgery. There should be fair distribution so that each child benefits. I'm not interested in any property myself. It should be for kids only. I have my own home.....He (*the deceased*) had only one son(*hers*). There is no way he could have died without providing for him. I am also sick(HIV/AIDS) like he was. So I thought of my children after my death. How Kagimu's children would sleep in the house and Kabuye's own children out. They(*the in-laws*) are after selling(*the deceased's property*). That is why I moved to protect our children."

Nabakooza drew the attention of the court to her role as mother and therefore her concern for the welfare of all the children which she was protecting, especially for the right of the only son of the deceased to inherit property from his father as is in cultural practice. As a propertied and independent woman she could not be seen to be interested in property for herself. She argued that as the matter stood, it was Kagimu and his son who were currently living in the deceased's house, who stood to gain, not herself or the deceased's own children. Her arguments had both cultural and legal implications.

Nabakooza drew the attention of the court to the obligation of the clan, to ensure that all the deceased's children were provided for, which Kagimu, as member of his clan had flaunted. Knowingly or unknowingly, she also drew the attention of the court to its duty to ensure that all the children of the deceased shared 75% of the deceased's property (Section 28(1)(iv) Succession Act as amended) which again had been disregarded by Kagimu. The main residential house of the deceased was to be left to the surviving spouse and children or in the alternative where there was no spouse or a person recognised as that, a person legally entitled to custody or appointed by court could occupy instead (Schedule 2 of the law of Succession). This implied that as *mother* and one legally entitled to their custody, she was also entitled to live in the matrimonial home with her minor children, not Kagimu and his son who were currently living in it. She had also prevented the in-laws from intermeddling with the deceased's property by denying them the right to sell it. Nabakooza went further and appealed to the sympathy of the court by revealing that she was a dying woman/*mother* as she was infected with HIV/AIDS, the disease that the deceased had died of and therefore could not be seen to be interested in property for her personal use. She was appealing to the court to make an urgent decision to ensure the children's welfare. The court in its judgement was 'moved' by her arguments and plea and made an unprecedented decision analysed in Chapter 9.

The in-laws on the other hand also used Nabakooza's *multiple identities* to try to deny her the ability to assert her rights. Before the DES they had not questioned her *identity* as a *widow* but only that she had not been empowered by the deceased in his will as they were, to look after his estate. However once in court, they changed their arguments to bring it within the ambit of the law. Through received knowledge they portrayed her as not a *lawfully wedded wife*. In the alternative, if she was, she had

deserted him at the time of his illness and death contrary to the law. The clan also sought to reach a compromise with the court by requesting that they follow the deceased's will. In both customary practice and the written law the will of a deceased is generally respected. They were well aware that having granted Nabakooza the letters of administration she stood in the court's favour. She had put herself forward as a *wife/widow and mother* and by granting her the Letters the court had *accepted these identities* and shown itself to be a protector of the rights of widows and children at inheritance. Both Nabakooza and Kagimu had effectively appealed to various sections of the Succession Act and the court's response is set out in Chapter 9.

8.1.7 Nabakooza's perception of herself.

Nabakooza perceived herself as a widow and as having a separate and independent existence from the deceased's family and with a right to her share of property, a right which if refused she as an individual could exercise against others (Whitehead:1984) Consequently when the deceased's family sought to deny her property she initiated legal proceedings. The support of the DES and the granting of the letters of administration by court was to her a recognition of her right as an individual in property. She had some limited informed knowledge of the legal process which she exercised and found workable. Consequently although she was contesting property with the clan, in the person of Kagimu and his witnesses, and she appeared to be standing alone in court, she was aware that she was already recognised by this very court as having a right to administer the deceased's property (but see Chapter 9 for the legal implications of being administrator). She was also in safe ground. When she took the DES to the location of the property in dispute she was in the stronghold of the clan. In court she was physically and ideologically removed from it into an arena where the clan was subordinate. This knowledge gave her the confidence to be

assertive in court. The court provided the enabling environment. Nabakooza also saw herself as a dying woman and wanted to ensure that her children were well provided for from the deceased's estate as he was their father. To have mentioned her condition in court revealed the extent to which she believed the possibility was real. This was also possibly a strong factor in the extent to which she was prepared to assert herself.

8.1.8 Enabling and constraining environment for asserting her rights.

In seeking to deny Nabakooza a share in the property, the clan had rejected her as wife of the deceased therefore making her an 'outsider'. In so doing, they inadvertently allowed her an independent existence and so she could assert her rights in law against them. The consequences of these assertions is revealed in the unprecedented decision of the court analysed in Chapter 9.

The court had already granted Nabakooza the Letters which led to this appeal. She was also conceptualised by the legal process as an individual with an independent existence with the ability to assert rights as an individual against others (Whitehead: 1984). This created the enabling environment for her to take legal action.

8.1.9 Conclusion

Throughout the process of the dispute settlement both in and out of court there are interactions and conflicts between individuals and between the forums. This is primarily a result of the various perceptions simultaneously taking place about the status of a widow for purposes of rights in property.

The interactions between the forums reveal the intricacies that are at play between 'the multifarious social fields present' (Griffiths 1986: 30). The forums are not independent of one another although they may have their own spheres of influence, ideologically or in their physical location as in an urban or rural area. However because individuals live

within and move between these spheres depending on the nature of the dispute or need at hand, as revealed in Nabakooza's case, they bring the forums to interact or into conflict (Figure 8.1). The availability of choices to individuals opens the door to these 'unpredictable patterns' of interaction because the interactions create enabling or constraining environments for each interested party depending on his or her ability to assert his/ her rights.

The thinking of the court on these arguments is discussed in Chapter 9 when analysing its perceptions of a widow according to law and as applied in the peculiar circumstances of Nabakooza's experience. What is important in this conflict is that when a widow/woman goes to court she has an equal opportunity to assert her rights to the deceased's property as the clan in contrast to her status during the *Kwanjula* where she has no say in property and sometimes in the marriage relationship described in Chapter 6 where she is conceptualised as subordinate in property relations.

In the struggles, especially in court, the widow's independent status is located 'outside' the clan stronghold. However when she returns with the law behind her to administer the property, her independent status becomes 'relocated' within the clan stronghold, in what is perceived as a subordinating environment.

8.2. Case two: the widow and urban property.

In the matter of the estate of late Vincent Ssemenda and in the matter of an application by Regina Ssemenda (widow) for revocation of order by the Administrator to redistribute the deceased's estate. 1994

The widow Regina was married to the deceased in church. She had four children with him but the deceased had 23 children altogether. He died in 1992. At his death, disputes arose concerning the distribution of his estate which included two commercial buildings, a matrimonial home and vehicles.

In September of 1992, the father in law sued the widow in their RC1 zone court over the estate of the deceased but he lost the case and he never appealed. The RC1 court then sitting in October 1992 ordered the distribution of the estate. The distribution to

the beneficiaries was carried out by the District Executive Secretary (DES), in the presence of the RCI, RCII and RCIII Executive Committees and clan elders. All the beneficiaries of the deceased and his clan accepted the distribution, which left most of the assets to the widow to administer. However the father in-law ignored the distribution and referred the matter to the DES.

A family meeting inclusive of beneficiaries and the clan elders was arranged at the office of the DES which concluded by sanctioning the RCI court decision and the subsequent distribution of the estate. The widow applied for letters of Administration and the court made her and her father in-law joint administrators. The father in law was still not content and intimidated the widow.

The widow hired a lawyer who took her case to court. She averred in her plaint in administrative cause no. 101 of 1992 but filed in court in February 1994 that at the time she married the deceased, he had no wealth. They had acquired all the wealth, which included all the properties in dispute together. She had documentary proof that she was one of the signatories to the purchase agreement at the trading centre where the matrimonial home was situated.

The father in law, Alozio Kwamufu alleged that the widow had deserted her husband six years before he died and should therefore not be entitled to anything. The widow however contended that she was around to nurse him when he was ill until he died. They were at that time living at a trading centre where they had a commercial building. The Chief Magistrate removed the father-in law from being one of the administrators of the deceased's estate leaving the widow the sole administrator.

The father in law referred the matter to the office of the AG at their headquarters in the capital city, Kampala. The AG ordered the redistribution of the estate. This was done in December 1993 and was as follows:

- a) The household property in the matrimonial home remained with the widow, including the commercial buildings and one room in another building which building was given to the father-in-law.
- b) All the properties of the minor beneficiaries were to be looked after by their respective mothers.

At the time of the research, the widow was still in the residential home and in possession and control of the commercial buildings which properties the father-in-law wanted to be administrator and in control of.

The matter then in court in 1994 was lodged by the widow who was discontented with the redistribution by the AG which gave her father-in-law one building. He was also continuing to intimidate her over the commercial buildings.

8.2.1 Harmony between forums as a shield of protection for the widow

The widow's experience in the urban area has some similarities and differences with the widow in the rural area. At the death of Regina's husband there were disputes with

her father in-law about the estates of the deceased. She lived in an urban setting. Her properties, except for the matrimonial home, differed in nature from that found in the rural area. She had commercial buildings and vehicles. The RCI of the area where the properties were located was, as in the rural area, called upon to preside over the dispute. He called upon RCII and RCIII, the appellate RC courts to be present. The clan elders were also present in recognition of their role at inheritance. Other beneficiaries had to be present too. Also, in recognition of the supervisory role and powers of the DES in the District and as representative of the AG at district level, the DES was called upon to distribute the estate of the deceased in the presence of all those concerned. The father in-law was not content and once again a meeting was arranged between the clan elders and beneficiaries in the office of the DES. They sanctioned the previous decision of the RCI court. This set of circumstances reveal that within the urban context there is a better understanding between the forums of each others roles, consequently they can support each other. This provides an enabling environment for a widow to assert her rights. This set of circumstances is due to a number of factors. Within the urban setting the population is generally composed of persons from various parts of the country therefore of different ethnic origins. Membership of RC committees would most likely be composed of more than one tribe and therefore allow for more objectivity when dealing with family law matters. It is also unlikely that an interested party would be sitting as an executive member. Often in the rural areas as reflected in Nabakooza's case, the RC members will be from the same tribe and may also be from the same clan as the parties in the dispute. The level of education as reflected among the widows in the urban centre is also a reflection of the calibre of the RCs which may foster a better understanding of the roles of the forums.

The father-in-law continued to make claims to the deceased property because of the commercial aspects of the assets. He had been made administrator of the deceased's property with the widow which implied that his share must have been catered for. It is also a requirement under the law of Succession that dependants of the deceased be provided for and these generally include the parents of the deceased (Section.28(1) subsection(iii) of the law of Succession). Regina had the advantage of living in an urban environment and with commercial assets which ensured the continued flow of material resources to pay for the services of a lawyer. The court's action in removing her father from joint administration was its recognition of her as an individual with the right to peaceful enjoyment of her deceased husband's property. It was also a recognition of the legal right of a widow over other beneficiaries.

The harmonious relationship between the forums at grassroots and in court within the urban setting clearly worked to protect and to ensure the widow a share in the property. In contrast to Nabakooza's case, Regina's case brought all the various forums to *a round table where they reached an understanding and agreed* upon the division of property. This guards against loopholes which one forum can use against another to serve its interest. The main effect of this *understanding and cooperation* between the forums especially with the clan where widows face most resistance, means that they can protect the widow against the interests of their own members. When the father-in-law took action against Regina, the clan and the forums that had sat together united in upholding their previous decisions. In Nabakooza's case the forums had separate occasions and were at different locations when making decisions. This partly contributed to the conflicts. The amicable interaction between the regulatory regimes in Regina's case is generally not the norm. *It is however feasible where no rule making body tries to assert its authority over other rule making bodies and seeks instead for a*

common ground or a compromise, as in Regina's case. The environment is also important. As noted earlier, in the urban location, cultural practices are watered down and new ideas are often put in place and given room for expression. A new way of handling a dispute would be more easily acceptable.

8.2.2 Regina's perception of herself.

Throughout the interactions Regina perceived herself as the widow of the deceased. Although her marital status was not in issue, her father-in-law used a similar argument as Kagimu in Nabakooza's case that she had deserted him (6 years) before he died contrary to S 31(1) of Succession Act therefore should not be entitled to any inheritance. Regina's response was also similar to Nabakooza's. She had nursed him when he was ill. Likewise she also argued that she and the deceased had acquired the family property together. She perceived her contribution as substantial because the deceased had no property at the time they married therefore this gave her the right to a share. She had documentary proof that she was one of the signatories to the purchase of the properties in dispute unlike Nabakooza who had to rely on oral evidence. This proof also gave her a 'tangible' voice. Widows often run into difficulties when making claims to property because so often, it is 'intangible.' Their husbands are more often than not sole signatory to the property(ies) in dispute. Their remedy lies in the court's decision in Edita Nakivingi v Merekizadeki (1978) HCB 107 where a widow's contribution in cash or kind is sufficient to give her a share. Regina, like the urban widows interviewed, reflects the level of knowledge that urban widows have about documentary proof of property. This can also be attributed to their level of education as reflected among urban widows in Chapter 7. Regina conceptualised herself as an independent individual and this was recognised by the forums in their joint support for the share of property given her. Only her father-in-law objected to this. He resorted to

redress away from Masaka town, the location where the cause of action arose. He took his case to Kampala the Capital city, about 80kms away where the main office of the AG is (see Chapter 3).

Regina was given substantial property by the AG, except for the loss of one property to her father-in-law. Her subsequent application to court to regain that property from him reveals that she had the resources to continue the litigation. It also reveals the extent to which a widow can assert her rights. Problems generally arise when a widow has been granted Letters of administration or probate and she tries to exercise the authority given her over the family property. As in Nabakooza's case, the property may be in the local cultural environment in the stronghold of the deceased's clan. Harmony derived through cooperation between the forums is a key factor in ensuring her peaceful enjoyment of the property and in enabling her assert her rights. Chapter 9 illustrates the way the Chief Magistrate sought to achieve this harmony in his decision over the property in Nabakooza's case.

THE WEB The interactions spun between the forums by the widow's actions.

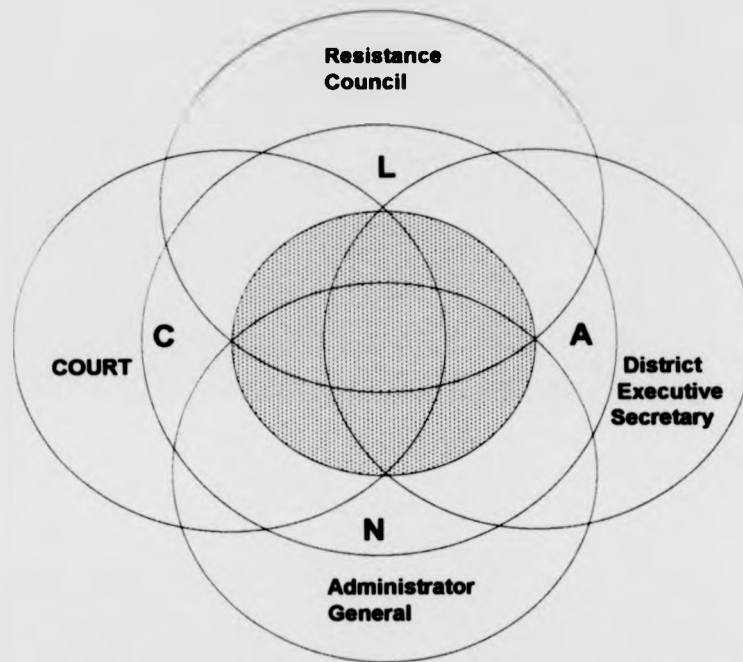


FIG. 8.1

Key



Points:

Widow and property

The widow and the property (of the deceased) are embedded in the clan.

- Her interactions with the various forums places the clan as guardian of family/clan property at the core of these interactions.
- the widow can be seen as caught in a web as she asserts her claims.
- The web reflects her struggle as well as her protection.

AUTHORITY in the FORUMS (in ascending order)

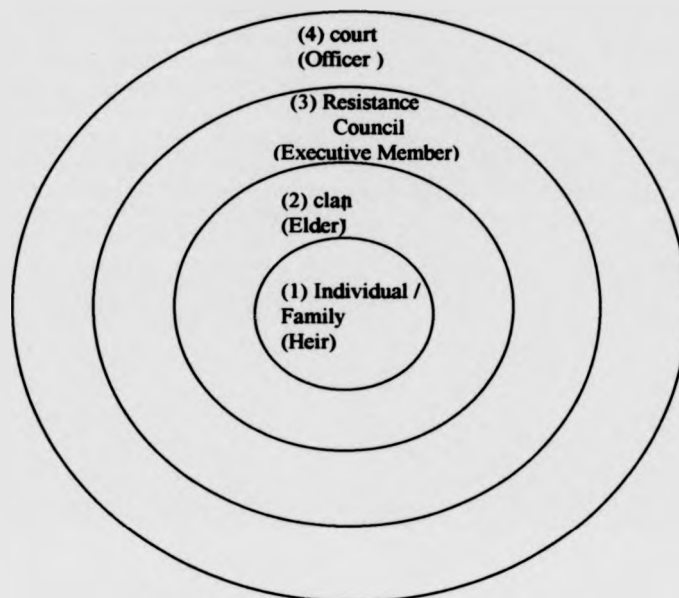


FIG 8.2

FORUMS (regulatory regimes) : REFLECT ;

Roles of responsibility : in the family e.g. as heir, in the clan as an elder, in the RC as an executive member, and in the Court/AG as an officer.

Hierarchy of Authority in ascending order : Family, clan, RC, Court and AG.

Levels of conflict between the forums/ regulatory regimes. At inheritance it usually begins with ;

- (a) the individual within the family against the clan ,
- (b) the individual moves to RC against the clan;
- (c)The individual moves to the Court/ AG against the clan and the RC

NB : The individual/ family is embedded in the clan therefore at the core of the struggles.

MULTIPLE IDENTITIES OF A WOMAN

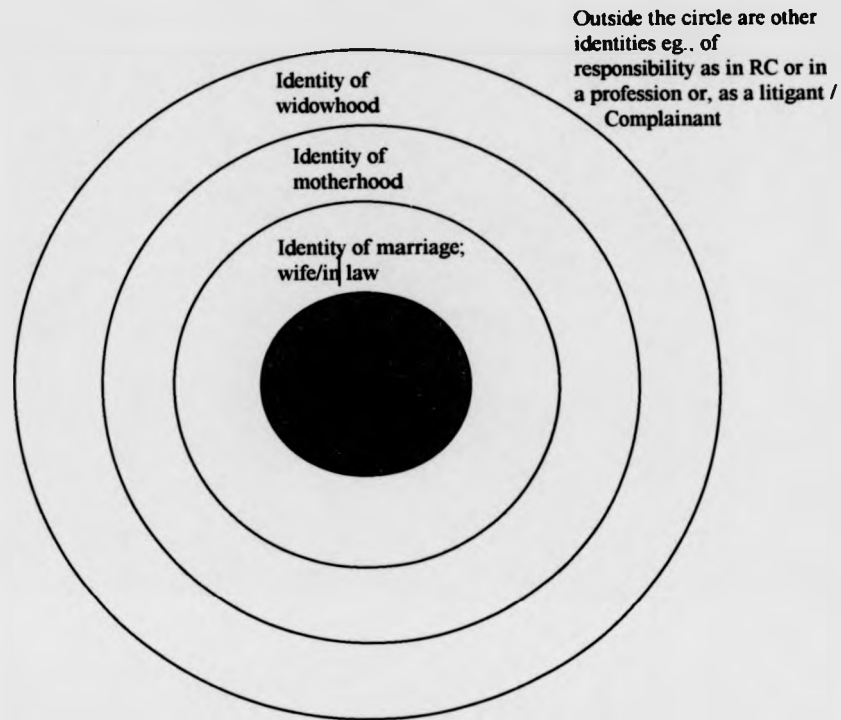


FIG 8 . 3

- (1) A widow has more than one identity at any given time as illustrated above.
- (2) At the core of this is her original identity before marriage that is when she, as a daughter, acquired her father's clan and was part of his family.
- (3) Identity of marriage as the wife of....
- (4) Identity of motherhood as the mother of e.g the heir, of twins etc
- (5) Identity of widowhood as the widow of.....
- (6) Other identities e.g. of responsibility as member of RC etc

CHAPTER 9

FORMAL LEGAL SYSTEM AND WIDOWHOOD

"Much of the problem entailed in weighing women's disabilities under the law concerns defining the role of law in the total array of social control forces that subordinate women in any given society. No society exists in which law is the sole regulatory force:....Law...is often the most behaviourally dramatic and articulately formulated of these social control forces, and therefore comes most easily to mind. It must be measured in conjunction with other social control mechanisms, however, if its efficacy and its limitations are to be understood..."(Dwyer 1982:517)

9.0 Introduction

Chapters 7 and 8 revealed that the urban setting provides a more enabling environment than the rural setting for a widow to assert her rights, because of a number of factors that combine to lessen cultural influence in the social organisation of the family at inheritance and especially in dispute settlement. A woman's self perception, as revealed by Nabakooza and Regina, remains an important element in the extent to which she is prepared to assert her rights. There are other variables, as for example, her resource position which allow her more independence and therefore enhance her ability.

This chapter explores the written law and the legal process in the grant of Letters of administration and the extent to which this formal legal system is enabling or constraining for the widow seeking formal redress from court. In view of the arguments advanced about the status of a widow, this chapter examines the court's interpretation of what is taken into consideration in determining who is recognised as a wife and consequently as a widow for the purposes of inheritance. The chapter also seeks to show the *efficacy and limitations of the law* in the grant and the actual implementation of the Letters of administration at grass roots, in view of the presence of clan and RC forums at the local level, which also have their own regulatory regimes for the administration of the deceased's estate.

In line with the arguments already advanced in Chapter 8, this chapter continues with Nabakooza's case, paying particular attention to the implications of the Letters of administration, the court's judgement for her and the extent to which she is able to assert her rights in these circumstances.

As noted in Chapter 2 (2.1.7), my experiences in interaction with widows and as a former Stipendiary Magistrate provided the stimulus to explore court processes at widowhood. Analysis of court process brings in my own experiences of presiding over family law cases including the administration of a deceased's estate. As also noted in Chapter 2, experience can be vital in research. Writing about experiential data, Strauss (1987:11), had this to say;

"Equally important is the utilization of experiential data, which consists not only of analysts' technical knowledge and experience derived from research, but also their personal experiences. These experiential data should not be ignored because of the usual canons governing research (which regard personal experience and data as likely to bias the research), for those canons lead to the quashing of valuable experiential data. We say, rather, 'Mine your experience, there is potential gold there!'"

We should add that the mandate to use experiential data gives the researcher a satisfying sense of freedom, linked with the understanding that this is not license to run wild but is held within bounds by controls exerted through a carefully managed triad of data collection..."

The analysis in Nabakooza's case takes me as the researcher into a better appreciation of the dilemma facing a Magistrate or Judge.

9.1 Legal status of a widow for purposes of grant of Probate or Letters.

The right of a surviving spouse to administer the deceased's estate is based on the legality of the marriage or the nature of the relationship at the time of death of the deceased. This is not always straight forward especially where there has been some misunderstanding between the deceased, his relatives and the surviving spouse and they were not living together at the time of his death as in Nabakooza's case. At the death of a man, a 'widow' or several 'widows' may turn up with children to lay claim to his estate. As reflected in Nabakooza's case, having children with the deceased

which acts as proof of a relationship, may strengthen a woman's application for the Letters where it is done in the interest of the children. The court will however not necessarily overlook the legality of the relationship with the deceased. In the case of Male Christine and Another v Namanda Sylifiya Mary and Another 1982 HCB 140, the plaintiff widow who was married in church, to the deceased, applied for grant of Letters of administration. The defendant, another woman, lodged a caveat and applied that she be granted the Letters instead. She relied on the number of children she had had with the deceased (four children) although he had not married her. She argued that the widow having had only three children with the deceased would not care adequately for her children therefore she, the defendant, had a better right to the Letters. The deceased had died leaving 12 children with different mothers. The court defined the status of a wife for purposes of *applying* for grant of letters to the deceased's estate. It relied on Section 3(1) of the Succession Act as amended by the Succession Amendment Decree No. 22 of 1972. This provision gives the definition of 'wife' as someone who was validly married to the deceased according to the laws of Uganda or according to the laws of another country where they were married, at the time of his death. Only a 'wife' within that definition is one of the persons entitled to apply for a grant for Letters of administration, subject to the rights of others. The High court therefore held that:

" The...plaintiff was the widow of the deceased and they were validly married. The ...defendant had never been the wife of the deceased although she had four children by him. Consequently the only person who could apply for Letters of administration was the plaintiff....

The court also observed that;

- (1) "... The mere fact that somebody had children with a woman does not entitle her to have a share in his estate at his death."
- (2) "...Where a deceased leaves a legal wife, concubine(s) and young children with different mothers, the only person entitled to apply for Letters of administration is the legal wife.'

While this case gives the legality of status for *applying* for the Letters, whether or not one is *actually granted* the Letters depends on the subsistence of the marriage at the time of death of the deceased (Section 31(1)) of the Succession Act), followed in Farasia Rwabaganda (1978)10 HCB 244, discussed in Chapter 8)

The legality of the relationship as defined above equally applies to a male *applying* for Letters of administration to his wife's property. The case of Daniel Kayizzi v Yosia Bisia (1980)HCB 38 illustrates this point. The defendant Bisia claimed that he was the widower of the deceased and had the right to succeed to her estate and therefore should be granted the Letters of administration. The plaintiff Kayizzi lodged a caveat claiming that he, as the brother of the deceased was the legal heir and beneficiary and therefore entitled to succeed to her estate. The plaintiff also challenged the validity of the marriage of Bisia to the deceased by placing doubt on the place of the wedding ceremony and the legal status of the officiating religious ministers. The court found that there was not sufficient evidence to support the plaintiff's claim. It found that the defendant and the deceased had been living as husband and wife and recognised as such at the time of her death. It therefore granted the defendant administration of the deceased's estate.

As discussed in Chapter 8, Kagimu, the brother in-law of Nabakooza, used a similar argument in line with his Lordship's reasoning in Male Christine's case above. He drew the attention of the court to the fact that the deceased had had children with different women outside wedlock and had left nothing for the women. The defendant as someone who had also had children with the deceased out of wedlock should not be in court making any claims. The court however exercised its discretionary powers in

upholding the grant of Letters to Nabakooza in what it considered "peculiar circumstances of the case." Referring to Nabakooza's status, the Chief Magistrate said;

"She applied in her capacity as the widow of the deceased. On the evidence available, although the marriage between Kabuye (deceased) and the defendant is not one legally recognised, there is evidence that they were living together as husband and wife since 1983. There are two surviving children to their defacto relationship. There is evidence further that at the time of Kabuye's death, she was still regarded as his defacto wife. She was involved in his care up to the time of his death. The defacto relationship has been proved to the satisfaction of the court. Since she was quick to apply for letters of administration in a situation where the deceased's relatives were purporting to administer the same without an order of court, and since her application was never challenged, I find nothing fraudulent about that. As a person who has spent close to 10 years together in a defacto relationship, she was legally entitled to put in an application as a widow. I so hold."

The nature of the relationship Nabakooza had had with the deceased was sufficient, *for purposes of grant of the Letters*, to persuade the court to accord her the status of a "widow." This meant that technically she was conceptualised as a wife therefore widow of the deceased and with a right to administer his property. In reaching this decision the court relied on the *duration* of the relationship and the fact that she was regarded by the deceased's clan as his "*defacto wife*."

The importance of the decision in Nabakooza's case lies in the wide scope that the court has given of who can obtain a Letter of administration as opposed to the more restrictive view in the two High court cases cited. As already seen, a marriage is not necessarily a ground for *grant* of Letters. It is primarily the acceptance by the law and, in customary practice, acceptance by the clan, that the couple lived 'as husband and wife' up to the time of death of the deceased. The chief Magistrate's definition widens it to include a person found to have had a relationship with the deceased that *is recognised by the court, in the circumstances of that case*, as sufficient for purposes of grant of Letters. While the two cases cited and Section 31(1) of the Succession Act narrow the circumstances for a married couple applying for the Letters, Nabakooza's case gives room to an unmarried couple in a long term relationship who have been

recognised by the community as husband and wife up to the time of death of one of them. This would protect the rights of persons like Nabakooza who may have had long term relationships with the deceased without entering a marriage relationship. There were instances of this in the research findings. The *spirit* of both the law and custom is concerned with protecting the estate of the deceased from an unscrupulous spouse or person whose relationship with the deceased had long ceased and now seeks to benefit unreasonably. On the other hand, persons who have to all intents and purposes lived as 'husband and wife' should also not be denied the benefits that derive from the relationship. It follows therefore that a long term relationship that confers on the couple the status of 'husband and wife' until the death of one of them should benefit the surviving 'spouse,' 'in the interest of justice.' Perceived in this light, the Chief Magistrate's departure from the legal provisions in granting Nabakooza the Letters, is strictly not a departure from the spirit of the law.

The implications of the grant of Letters reveals contradictions for the person granted the letter. This has implications for the extent to which a woman/ widow can assert her rights to the deceased's property in the *actual implementation*. It is explored below.

9.1.1 The extent to which a woman can assert her rights with Probate or Letters.

A person granted probate or Letters under 'The Administration of Estates (Small Estates) (Special Provisions) Decree 1972' (hereafter the Decree) and 'The Administration of Estates (Small Estates) (Probate And Administration) Rules 1972' (hereafter the Rules) makes a declaration under oath in Form 6 under the Rules. The relevant section of the declaration provides as follows ;

"...that I WILL FAITHFULLY ADMINISTER the estate and effects of the said deceased by paying his just debts and distributing the residue of his said estate and effects according to his will (customary law), that I shall make a true and perfect inventory of all and singular the said estate and effects and render a just and true account thereof whenever required by law so to do."(*emphasis mine*).

The above provision is also in line with Section 3(1) of the Decree, which provides as follows;

"Subject to the provisions of any written law and of subsection (2) of this section, any person to whom letters of administration are granted shall administer the estate of the deceased person in accordance with the custom relating to the succession of property of deceased persons of the class of which the deceased was a member in so far as such custom is in conformity with the principles of natural justice, the doctrines of equity and good conscience."(emphasis mine).

Subsection (2) provides as follows;

"Where any person entitled to a share under the will or in the distribution of the estate of a deceased person is a minor, and the guardian of such a minor is not the natural parent, the court shall, where such share is a sum of or more than ten thousand shillings, appoint the Public Trustee to receive such on behalf of the minor."

The provisions in Form 6 under the Rules and S.3(1) of the Decree are in line with the parent statute, the Judicature Act 1967 Section 8 (1) which provides that ;

"Nothing in this Act, shall deprive the High Court of the right to observe or enforce the observance of, or deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law." (also provided in the Magistrate's Courts Act Section 15 (1))

Section 8(2) of the Judicature Act provides that;

"No party to a suit shall be entitled to claim the benefit of any custom if it appears from express contract or from the nature of the transaction out of which the suit or question has arisen that such party agreed that his obligations in connection with the transaction shall be regulated exclusively, by law, other than by customary law."

In these very statements , it is recognised within the 'formal' law that *"no society exists in which law is the sole regulatory force,"* it operates *"in conjunction with other social control mechanism.(Dwyer:1982.)"* The provisio that is created by Section 3(1) of the Decree as a check and balance to custom in the words *"Subject to the provisions of any written law...and also ...in conformity with the principles cf..."* is meant to allow room for the formal law to be part of the regulatory regime in *'the array of social control forces'* (Dwyer:1982:517) or *semi-autonomous social fields* (Falk Moore:1978) which are on going in the social organisation of a society. Although the

words "*any written law*" under the Decree are not given interpretation by the law, it can be safely assumed to refer primarily to any statutory laws regulating Succession to property and then any other law of the land relevant to a particular case. Section 8(2) of the Judicature Act, for example, provides for a person to *opt out* of customary law either expressly or indirectly through his or her action in a transaction. Also what is meant by '*the principles of natural justice, doctrines of equity and good conscience*' depends most often on the perception and interpretation of and the 'good conscience' of the Magistrate or Judge presiding over the case. This is evidenced in the judgement of the Chief Magistrate throughout Nabakooza's case.

The main effect then of the declaration in Form 6 and Section 3(1) of the Decree and the Judicature Act is to create a compromise between law and custom. However the conflicts between Nabakooza and her in-laws and some of the examples given in the Masaka interviews, reveal that the formal law is generally seen more as an imposition and an intrusion into existing social organisations rather than a compromise.

As clearly stated, the widow or any person who is granted the letters in intestate succession is expected to *administer the estate according to the deceased's customary law*. However the grant of Letters is perceived by the grantee and generally the rest of society within the context of the 'notion' of law. Society in general does not know or understand legal provisions or its implication. It is aware that the law has powers of arrest, prosecution and imprisonment and that it also gives a person certain rights over others. It is this notion that appeals easily to mind. The widow therefore goes to the law to obtain 'certain rights' over those interested in the deceased's estate, especially where she believes she has been denied property. Once the Letter of administration is in her possession, she returns home with the belief that she is the *only one* with the *right of administration*, which to her implies *possession and control* of the deceased's

estate (evidenced in the interview with widows in Masaka). What she does not fully comprehend is that *her right is limited and the administration is qualified*. It is subject to "*the custom relating to the succession of property of deceased persons of the class of which the deceased was a member..*" This as already shown implies the appointment of an heir to the deceased's estate according to custom and if the heir and children are minors the appointment of *abakuza*/guardian of the share of the children's inheritance. In practical terms, these persons would be administrators of properties in their care. What is actually being stated by the law is that administration is to be shared with the guardians of culture and custom. "*Subject to the provisions of any written law..*" means for the widow with the letters that under Schedule 2, she as mother or the person entitled to legal custody of children is entitled to occupy the residential house normally given to the heir, so long as she does not remarry or absent herself for more than six months without reasonable excuse. It is also the house and its surroundings that she will in practical terms effectively administer. For the clan the same provisions mean that they are to respect the provisions of Schedule 2 which permit a widow to live in the residential house.

The widow also believes that the whole force of the law is behind her to protect her rights against interference from those who seek so to do. While the law will indeed protect her rights, the protection is limited to her share and also to S.5 of the Administration of Estate's Decree which provides;

"After any grant of probate has or letters of administration have been made, no person other than the holder of the grant may sue or otherwise act as representatives of the deceased, until such is revoked."

Generally the powers to sue and act as representative of the deceased are culturally powers of the clan. Therefore in this respect, that is, for *litigation and transaction* purposes she is empowered to act solely. This not only elevates her status under

culture but also empowers her to assert her rights against others and with the protection of the law, including where she is challenged as in Nabakooza's case.

To those who seek to claim their rights under custom and who know she has the Letters, there is fear and restraint as illustrated in Nabakooza's case with her brother in-law, Kagimu. None of them is aware of the actual provisions of the law and its implications. It is therefore not the substance of the law that appeals to them but the notion of the law. *It is this notion of the law that makes a woman perceive herself as the person granted the control and possession to the exclusion of all others and encourages her to assert herself* to the extent to which Nabakooza has. In the same way, the in-laws also perceive the widow in the same light and inadvertently allow her more control over them than is prescribed by law. It is for this reason that Nabakooza's in-laws went to court out of fear of the powers they believed she had not knowing that they could have negotiated with her to respect the deceased's customary law within her grant of Letters.

Legislators are often not fully aware that it is not often the written law that resolves the conflicts in situations as above but the notion or perception of it. Sometimes the mere presence of an agent of the law such as a Magistrate or the police is sufficient to create fear or restraint and to bring about unforeseen results.

9.1.2 Importance of children in giving a widow the ability to assert her rights

As noted earlier, Nabakooza had drawn the court's attention to her multiple identities. As mother of the deceased's children she was afraid she would die and have no one to look after them. She was also concerned that the in-laws, especially Kagimu, the deceased's brother, would not look after the two children. The Chief Magistrate responded ;

"The defendant is certainly right to imagine that she will soon die and leave her two children without shelter when their father did not die a pauper. What I am being asked to determine is, what happens if a man dies leaving houses, no wife but leaves illegitimate children whom he has however recognised as his own? The answer is simple. The children will have the right to occupy the house and their mother (though not legally a wife) has a right to occupy the same as a person legally entitled to their custody. In the event of such a mother dying without leaving any relatives ready and willing to look after them until they become of age, courts can appoint a person to live with and look after such children. In the instant case, there are people willing to look after the children. Their grandparents are alive. The brothers and sisters of the deceased are alive and interested in preserving the estate.. "

The Magistrate's frank comment and sympathy for Nabakooza's health was influenced by the AIDS pandemic in the country. The judgement also reveals the importance the law attaches to the identity of a woman as a mother, especially of minor children. At the death of their father she would normally be the person entitled to their legal custody which in turn would give her the right to occupy the house and therefore administer the property on their behalf. The court's judgement reflects this:

"The letters of administration granted to the defendant shall be in respect of the property herein specifically decreed to her children."

Later in the judgement the Chief Magistrate clarified the distribution of the property.

He said;

"Upon carefully listening to both parties, I find that the interests of justice would best be served by ordering that the house at Kirimya be surrendered to the deceased's only son, Henry Kasule. The two (*the son Kasule and his sister Nakayiza*) shall be at liberty to occupy the house and their mother (Nabakooza) shall have a right to occupy the same as the person legally entitled to their custody." (*emphasis mine*)

In these circumstances the 'good conscience' of the court was driven by Nabakooza's ill health and the responsibility of ensuring the welfare of the deceased's children. Nabakooza was able to assert her rights to the enjoyment of the deceased's property through her children. Her rights can be seen to be subsumed in that of her children. In that respect, the question of her marital status is therefore immaterial, unless if she had insisted on her personal share. Consequently, where a woman fails to establish the existence of a relationship between her and the deceased that is seen to be that of

husband and wife *she can still assert her rights as mother of the deceased's children and so gain access to his property*, provided, there is no other woman who has a better right, for example is married to the deceased, as in the case of Male Christine (1982). In those circumstances she need not have been living with him at the time of his death as long as she can prove paternity.

Under the law, the estate (residential home) of the deceased is conceptualised as in custom. It is recognised as belonging to an heir who would be *'the person entitled to the legal estate'*. This would appear to be the essence of schedule 2 especially highlighted in S.7 (i) of the Schedule ;

"The occupant shall not without the consent of the person entitled to the legal estate subject to the occupancy, use the residential house or any part thereof for any other purposes than the purpose for which the same was used immediately prior to the death of the intestate;"

This was the implication of the grant to Nabakooza. Her son was the one granted the legal estate. The Chief Magistrate also made the same provision in the case of the remaining five children of the deceased. He said;

" The other five children without mothers to keep them custody shall be entitled to occupy the house at Bisanje. The plaintiffs shall be at liberty to appoint amongst themselves a person or persons to live with and look after the said children. They will be at liberty to rent out the same wholly or in part as they deem fit so long as they know that they are keeping the same in trust for the children until they become of age and decide on what to do next."

The Chief Magistrate granted the children the legal estate since the deceased had recognised them as his own. The plaintiffs were to act as *abakuza* /guardians and their right to administer would cease upon the children coming of age. The main effect of Schedule 2 is primarily to ensure the welfare of the children and the right of the surviving spouse who are all perceived as having a better right to live in the house than the person entitled to the legal estate especially where that person is not a child of the deceased. As already seen, a brother of the deceased can be appointed heir therefore entitled to the legal estate. Widows are especially vulnerable to being evicted from the

residential house by the heir as evidenced by the testimony of RC officials (Chapter 7). Some widows spoke of being allowed by the clan to remain in the house to look after the children. As under custom, the widow's right to occupancy terminates on her remarriage as she is expected to live in the home of her new husband (Section 8(a) Schedule 2). The same does not apply to the surviving husband who remarries. No consideration is given to the fact that the woman may be the owner of the home or may have contributed substantially to the building of the house as was decided in Edita Nakayingi v Merekizadeki (1978) 107. Her remedy would lie in proving her rights in the property in court.

9.1.3 Limitations of the law on ongoing social arrangements.

In granting the plaintiffs the right of appointing a person from among themselves to be in custody of the five children and their house, the court was expressly acknowledging the role of the clan at inheritance especially its obligation to minor children and their property. The facts according to Kagimu's testimony appear to show that the mothers of the five children were alive. However because they appeared not to have made any attempt to present themselves in court, or make their wishes known the court fell back on the clan. The court went further in recognising the clan's role under custom. The Chief Magistrate said of the other properties;

"As for bibanja (land), it shall be up to the plaintiffs to ensure fair distribution of the property to all the children. However, Kasule and Nakayiza shall be entitled to the wood lot at Kawoko and the banana plantation, if any, at Kawoko. (emphasis mine)"

As noted earlier, Section 28 (1) (a) of the Succession Act as amended provides the percentage shares that various beneficiaries should receive from the deceased's estate. However percentages are foreign to customary practices and concepts of inheritance. The nature and quantity of the property, for example, the piece of land, the only bed or bicycle would be difficult to divide into percentages. Court practice, which is often a

deviation from the application of the percentages, reveals the limitations of the written law. The court therefore fell back on the clan and *left it to them* to decide how to divide the *bibanja* and household items. About the household items, the Chief Magistrate had this to say;

"This court cannot go into the details of sharing the household items to each individual child. However an item like the bicycle must obviously be kept to the only male child. The rest will be shared out in accordance with the rules of intestacy governing the community to which the deceased belonged." (*emphasis mine*)

Once again in this statement the court acknowledged the importance of the clan and custom in the distribution of property at inheritance (Section 3(1) of the Administration Decree). It is striking that the court should decide that "*the bicycle must obviously be kept to the only male child*" In this statement, the Chief Magistrate used his 'good conscience' which reflected his personal experience and knowledge of cultural symbolism of certain items of property. In the rural setting especially, the bicycle is the commonest means of transport and it is generally owned by a male in the home. Among the Baganda it is unbecoming for a woman to ride a bicycle whereas in the Northern and Eastern parts of Uganda, a woman may own and ride a bicycle. However a bicycle is generally culturally associated with a male. A man's bicycle would normally pass to a male at his death. This 'bicycle judgement' reflects the Chief Magistrate's cultural upbringing and background. Although a Judge or Magistrate may have legal training he or she may still be influenced in cultural issues by the cultural background or experience. This is not to say that his or her judgements are necessarily coloured by it.

The Chief Magistrate went on to make provisions in anticipation of the likelihood of future events. He said;

"In the event of the defendant dying sooner than later, the plaintiffs shall be entitled to administer the entire estate on trust for the children"

In this statement the court also recognised the husband's clan as the ultimate guardians of the deceased's children and their property, as under custom. It is only qualified where there is a surviving widow. Although this was not in issue in Nabakooza's case, the law under Section 47 A(1) of the Succession Act as amended recognises only the patrilineal line as guardians of the deceased husband's children unless she, like any other, was so appointed by the will of the deceased. It clearly entrenches customary practice. It provides as follows ;

"On the death of a father of an infant where no guardian has been appointed by the will of the father of the infant or if the guardian appointed by the will of the father is dead or refuses to act, the following persons shall, in order of priority specified hereunder, be the guardian or guardians of the infant child of the deceased, that is to say;

- (a) the father or mother of the deceased.
- (b) if the father or mother of the deceased are dead, the brothers and sisters of the deceased ; or
- (c) if the brothers and sisters of the deceased are dead, the brothers and sisters of the deceased's father; or
- (d) if the brothers and sisters of the deceased's father are dead, the mother's brothers;
- (e) if there are no mother's brothers, the mother's father.
- (2) If there are no persons willing or entitled to be a guardian under para.(a) to (e) of subsection (1) of this section, the court may, on the application of any person interested in the welfare of the infant, appoint a guardian.

The law however provides that any person acting by virtue of Section 47A "shall act jointly with the mother of the infant, unless the court otherwise directs"(Section 47 C).

The effect of the two sections above is that a widow is conceptualised as not having sole rights in her own children. Once again the emphasis given to the guardian subsumes the widow's right which is as it were 'hidden' within the guardians. This provision has been criticised by women's organisations and law reformers as entrenching customary concepts of the role of guardians and of children as belonging to the husband's clan, and of relegating a woman to an inferior position to that of her husband's clan over her own children. However it is necessary to keep in perspective what has been observed earlier, that under custom and according to legal construction

in the above case, a guardian is conceptualised as a caretaker and therefore does not have rights in the property of the children. The general effect of both the customary and legal construction is emphasis on community rather than individual responsibility over children. Consequently no individual male or female has absolute rights over the children, their property and their welfare, except perhaps the father. The law however is not clear about the father's position. As it is silent about guardianship of children when a woman dies, it can be assumed that the father is automatically presumed by law to be the guardian unless the guardianship is challenged. In practical terms however guardianship does not mean the person who will ensure the day to day care of a child. This is the role of women, generally the mother of the child unless she is not alive or does not have the child in her custody. These are not considerations within the 'limited mind' or 'good conscience' of the law in granting guardianship to the in-laws. However in recognition of the role of females in bringing up children, it includes the mother and sisters of the deceased and the sisters of the deceased's father as guardians under S 47A (1) of the Succession Act.

The court can also be seen in the above set of circumstances as being fully aware of the '*limitations*' of the law in regulating the lives of the indigenous peoples (Dwyer: 1982, Falk Moore: 1987). For law to be effective at grassroots, the court had to fall back on the indigenous practices that are understood by custom and regulated by clan. It however reserved for itself room for intrusion, in the interest of '*natural justice....*'

The Chief Magistrate said,

"This order shall be varied if court is satisfied that movement of property from one home to another will be necessary for the equitable distribution of the deceased's estate to all his seven children put together."

The court acknowledged the importance of the role of the RC in the implementation at grassroots, if 'natural justice' was to be realised. He saw the RC forum as mediator between the legal forum and customary forum. He said;

"The RC1 of the area shall in all cases determine what is fair and equitable in all such distribution to avoid unnecessary looting of the deceased's estate."

The court did not revoke the initial grant of Letters of administration to Nabakooza but because of the peculiar circumstances of the case, varied it. It concluded by adopting a conciliatory attitude towards the parties in dispute, a method often used by the clan in the settlement of family disputes.

"Each party shall make an inventory in respect of property put under it's care within three months from date of order.

As for costs, this is a domestic misunderstanding between in laws. An order for costs would further undermine the already existing sour relationship. To foster harmony and peaceful co-existence, parties shall bear their own costs incurred in this litigation."

And so concluded the case. Hearing of the case had commenced on the 21/8/92 , was concluded on 31/8/92 and judgement delivered on 14/9/92 in less than a month. This was by ordinary standards very efficient, considering the bulk of cases and limitations of court resources including the few Magistrates in the country. For Nabakooza the matter had began when the deceased died on 15/2/92. It took seven months to conclude the case, at least in court. The extent to which court judgements are implemented is often not known until a complaint surfaces in court. This would be an important area for further exploration by researchers. The chief Magistrate tried to put in place safeguards to ensure protection for Nabakooza and the children. Evidence in Chapter 7 reveals the role and place of RCs in the implementation of claims by widows. Their location at grassroots where the properties are situated places them in this unique position to ensure compliance. This is in spite of the complexity of their relationship with the clan as already discussed in earlier Chapters (4,5,7,8).

An important issue that comes through the reasoning and judgement of the court is the extent to which the welfare of children reinforce the rights of others. The biggest share of a deceased's estate, 75% is left to the children. The interests of a 'recognised' surviving spouse is also protected and reinforced by the presence of minor children. Persons who have legal custody or are guardians of the children also have their interests protected by the court to the extent that it is for the welfare of the children. The whole spirit of the law therefore rests primarily on protecting the estate of the deceased to ensure the welfare of the young and of future generations and then of those who generally have legal custody of children, that is parents. Customary law emphasises children and members of the patrilineal line.

Although Schedule 2 reveals that there is emphasis on the protection of a widow who stands in a more vulnerable position than a male because of cultural practices, the protection is limited by the law to the extent that she does not remarry. While motherhood reinforces her protection, remarriage takes it away from her. Although no research was carried out on this aspect, it would appear to be a false assumption by the law that a woman who marries will have a roof provided over her head by a husband. The research findings in Masaka reveal that there are women who have contributed substantially to the building or completion of a house after the death of their spouses and appear unlikely to surrender the house whatever the outcome of their marital status. Their determination is tied up with the welfare of their children.

The law emphasises the interests of children in the estates of a deceased above all other interests. Widows are also primarily concerned about the interests of their own children but many are also concerned about their own interests especially where it involves the residential home and land for cultivation. The clan while emphasising the interests of children above that of their mothers, is ultimately concerned with retaining

the deceased's estate in the clan. Consequently an heir can be appointed from any male within the deceased clan although priority should be given his son(s). Sometimes relatives of the deceased husband will insist on taking possession of his property as it will be used within his clan.

The decision of the Chief Magistrate to grant the RC the authority to supervise the distribution to guard against injustices does not set a new precedent but reinforces what appears to have been on the mind of the State and legislators in setting up the RC system. It is seen as an administrative and judicial structure that can protect the rights of members of its community as well as a political tool for democratic participation in decision making. The relevant Articles of the 1995 Constitution discussed in the concluding Chapter 10 gives direction of the thinking of legislators on the vulnerable in society or those who have been marginalised as a result of tradition and custom among other things. It emphasises affirmative action and priority of treatment for them including their participation in decision making and their protection from negative customs.

9.1.4 Conclusion

What appears striking in the research findings is that a woman who goes to the RCs and settles her case outside court with the clan, generally has control and ownership of property given her by the clan. A woman who goes to court, has the control and ownership she is looking for, denied her by the Letters of administration which only give her shared administrative powers. She will also have to contend with the clan as Nabakooza did, if the clan is not consulted when the court makes a decision over a deceased's estate.

This suggests that for the majority of women who generally live in rural areas, the RCs are the most effective forums to assert their claims. For women in urban areas although

the court is important, the RCs still play a vital role. RCs are at grassroots, in touch with the daily lives of people and indeed know the issues better. While they appear to be bastions of tradition, the provisions of the Judicature Act, the Administration of Estates Decree and the Succession Act and the RC Statutes give either expressly or indirectly, the authority to preserve the 'good' in tradition. The spirit of the law is about preserving customs and not denying any person the benefit of the custom. It only seeks to prohibit those customs that would result in injustice for the person(s) whose lives are regulated by custom and these are still the majority especially in family relationships.

The next chapter gives some ideas of the direction in which the State, legislators and indeed the general populace wish to go in the development of the law, the place of custom and democratic participation by both male and female in the development of the country.

CHAPTER 10

CONCLUSION AND DIRECTIONS FOR FUTURE RESEARCH

The study has explored the lived experiences of women to determine the factual issues that confront them within their local cultural context and the actual strategies they employ to resolve the problems they face. This avoided making generalised assumptions about impacts on their positions in society by what it imposes on them, and their presumed subordination. In a society like the one studied, the position of all its members that is men, women and children are constructed and influenced by obligations and responsibilities within kinship. It is through the clan/family council that customs and practices are articulated, embellished maintained and enforced. The effect of this is that the values of the community to which an individual belongs take priority over individual rights in family relationships.

The society studied has revealed that there is more than one legal order that regulates relationships within a community. There are a number of reasons for this. There is the societal customary system that has been and still is the foundation of the society. Then there are the statutory courts that were imposed as a result of the reception of English law during the British protectorate and which have different sets of values and ways of determining family relations and resolving family disputes from customary practices. There has also been the development of State systems and values that have arisen out of Uganda's historical experience especially in the political development of the country. Currently it is the Resistance Councils now Local councils(RC/LC) that are being developed by the State for democratic participation and decision making by the people. The research has revealed that each legal order has the capacity to generate rules and to

induce compliance on individual members or groups in the community and in that way are autonomous. However because each legal order can deal with a given situation and often seeks to do so or is invited by members of the community to intervene, the actions of the various legal orders combine to create situations of competitions and negotiations revealing their semi-autonomy which have implications for conflict resolution with the society. In terms of family relationships, the presence of various legal orders give individuals choices to settle their disputes which in turn impact on their roles, responsibilities and obligations within kinship and consequently are redefining family relationships, the roles and obligations of individuals (male or female) and of group authority such as the family council or clan.

The findings reveal that the overlap in the spheres of influence of various legal orders is generally brought about by the availability of choices open to an individual as he or she moves from one sphere to another seeking to assert his/her rights. In such situations, the individual who is dissatisfied with the rules in one legal order crosses into another field to seek a solution and in so doing carries with him/her rules already generated in the former field. This is best illustrated in Nabakooza's case. On the other hand the making of a decision may mean that more than one legal order is involved from the onset, as in Regina's case. The findings have revealed that the clan/family council is the most resistant to change and any imposition of rules from outside which seeks to alter its social arrangements. It is therefore at the centre of conflicts. It has revealed that the strength of the clan/family council lies in the fact that much of the society within the rural area has remained untouched by the influence of the received English law and therefore are largely influenced by customary practices. The creation of the RC/LC has worked on one hand to

strengthen custom and on the other to water down some of its influence as discussed further on.

The research has revealed that there are ways of resolving the conflicts between the various legal orders. This is generally through mediation or negotiation with all the contesting parties having a voice. The final outcome often depends to a large extent on the support given by a legal order whose capacity to enforce rules and compliance is perceived as greater than that of the contesting legal order, the extent to which parties interests have been fulfilled, and the location of the property(ies) in issue. The research has revealed that the availability of choices of forums depends on the urban/rural location of an individual. Location also has different impacts on the individual's ability to assert himself or herself. Within the urban setting where statutory courts are well established and there is a general awareness of legal penalties, fear generated through this knowledge generally restrains interference with another's rights. This makes the formal law an effective regulatory regime for protection of rights within the urban setting, its sphere of greatest influence. It is important to note that in the experiences described, the formal law does not initiate the action to protect. It has to be approached. This involves knowledge of its functions and the availability of material resources for action, such as the employment of a lawyer and the fees prescribed for the initiation of any action within the formal law. For a person from a rural area, ignorance of the substance of the law, distance and the resources required for transport, especially where there is delay in settlement because of the need for evidence and counter claims in itself defeats the purpose of the law. This limits the extent to which the formal law can provide protection to the disadvantaged in society in the cultural environment as the one studied.

The research has revealed that in the rural area the formal legal and administrative regimes are resisted and their decision not taken at face value (Nabakooza & Respondent 4 in Chapter 1). However once a party from a rural setting seeks a remedy from the formal law, this sometimes forces the members in the informal customary regime to seek a solution within the formal, primarily because of their informed knowledge (correctly or wrongly) and their perception of the law as an instrument of punishment. For example, an important finding in the research is the meaning attached to or the misinterpretation given to the Letters of Administration by the ordinary person. The research reveals that the Letters (formal law) on one hand entrench customary practices of the distribution of the deceased estate according to custom, the very thing that women go to court to seek a remedy for. On the other hand the Letters gives her the authority as the only person to sue or make contracts concerning the estate and protect her rights of residency in the matrimonial home. The ordinary person cannot understand these provisions and will either accept it out of fear of legal penalty, or contest it. The research has revealed that in the rural area where disputes are resolved or settlement made outside the formal court, women in many cases acquire property, sometimes substantial. The importance of this is that the informal system, especially the clan/family council, is a direct party to the negotiations and settlement and will not therefore seek to undo its own authority within its sphere of influence. It was a party to the generation of the rules in the settlement therefore will uphold it. Unlike the formal law, the clan/family council initiates the actions for settlement as part of its normal and recognised role in the family. Only when there is discontent with its decision does the aggrieved party initiate action sometimes within the clan/family council itself or outside. Because the formal law is invited to act within an

ongoing social arrangement, it is generally seen as imposing rules from outside the social arrangement, including when it is in part supporting the social arrangement, as in the case of the grant of Letters. There is a gap in understanding between the formal and informal.

The creation of the RCs, discussed further on is vital in bridging the gap.

The presence of a number of legal orders within a given situation has implications for conflict resolution and the protection of rights. The research reveals that there is demarcation of spheres of influence of the formal and informal generally determined by urban or rural location. However the boundaries of this demarcation are seemingly elastic as seen in the overlap of their spheres, illustrated in Nabakooza's case. Within the courts/formal law, Nabakooza's case provides some insights into the relationship between the spheres, in conflict resolution. The case reveals that the use of law for regulating the social organisation of society is made most effective with the cooperation of the already existing regulatory regimes in society. It is one thing for the law to prescribe the rules and another to implement it. The power for *effective implementation* of the written law outside its sphere lies not at the 'top' with the law but at the 'bottom' with the social organisations (Clan & RC) at grassroots. These have their ongoing rules and can and do induce compliance, are located within the lived reality of the people, are more readily accepted and also act as a check on legislative powers. It is through the sharing of their power, through the distribution of responsibilities within the regulatory regimes as was done in Nabakooza's case that there will be effective implementation of decisions. The regulatory regimes also act as a check and balance on each others powers. The semi-autonomy of the regulatory regimes is therefore vital for the effective implementation of rules in areas that are shared by them.

The findings have also shown that the choice options available means that individuals have the benefit of different ways of settling their disputes although this is also determined by other factors such as resource position, physical location and especially the individual's perception of his or her interests and needs and desired come.

The research confirms the assertion by the WLSA researchers (Ncube et al 1995) that the extent to which a woman/widow is able to assert her rights and so determine her fate depends to a large extent on her self perception and what she sees as her entitlements. The research reveals that this self perception includes a number of ingredients. That it means her self perception as the deceased's wife irrespective of the legality of the relationship and the implications of this for her entitlements in the matrimonial property; her concept of the property acquired in the relationship as family unit property not communal property; her perceptions of her contributions to the property and what she sees as her rights in them. Also very important is her self perception as a individual over whom no one has any rights, rather she is the one who has the right to make decisions over her life especially in terms of relationships. With respect to children, it is clearly implied in the distribution of property that they belong to the clan and she is a caretaker/ guardian of them and their resources. However a widow's insistence on a fair share for herself and the children has greater implications. The study has revealed that in those situations she is asserting her individuality and also her identity as mother and therefore rightful guardian of *her* children. Implicit in this is certain legal and social entitlements that come with being mother especially of minors-the right to live with the children in the matrimonial home as one who has legal custody and with it the peaceful enjoyment of family property. What emerges as most crucial in the determination of these family relationships is her self

perception as an individual with specific rights, and with no rights over her. The research has revealed that *the emergence or development of her individuality has much to do with her resource position*. An understanding or analysis of this *uncovers* her ability.

A woman's resource position is crucial to her ability to assert her rights. The research has revealed that as women's level of education rise, it gives them wider choices. They see their level of education which often implies some professional qualification and opportunities for employment therefore acquisition of personal resources as enabling them to assert their rights especially in the courts. Some also see their level of education as giving them respect in the community and greater ability to assert their rights.

The findings reveal that urban women are more likely to use the statutory courts as it is within easy reach and many of them are financially able to do so. Many of the women are also literate and gain knowledge from others who use these courts. Rural women rarely use statutory courts because of costs, distance and the 'foreign' nature of dispute settlement and many are illiterate. However a much stronger factor is that the majority of rural women have always had local means of settling their disputes, that is through the clan or chiefs, a method which they are used to and which has been reinforced by the introduction of the RCs/LCs at grassroots. Disputes are settled in the light of cultural customs and practices which are familiar to them. There is rarely any financial payment except where compensation is required and these are often in kind. Consequently women do use these local methods. *A wider definition* therefore needs to be given to what is meant by *a woman's resources*. The resources: *"include her personal, physical and mental capacity to handle emerging problems and tasks. Other examples of resources are kinship, friendship, property, money and education (Weis Bentzon, 1998:110,*

White:1988Ph.D). Her knowledge of her legal rights and use of statutory courts provide the legal resource to widen her options. A wide definition of resources as given allows for a better understanding of the class differences between women and can help to facilitate realistic ways of enhancing their ability to assert themselves. The research reveals that the kind of resources at a woman's disposal are affected by her positioning in terms of urban/rural location, class, status, and the legal orders in her sphere of action.

Several forums emerged as being important at inheritance for dispute settlement. These include the clan, the RCs/LCs, the court, the Administrator General and his representative the DES, the police and the probation office. The introduction of the RCs/LCs to bring litigation closer to the majority of the people and its popularity has important implications for the development of the popular justice. These courts are located between the statutory courts and their systems and the customs and practices of the people. While it is true that in the rural areas they lean more towards customs, within that context they are recognised as having wider functions and can rise above cultural practices. It was noted earlier that there is a gap between the statutory courts and customary practices. These courts stand as a bridge between them. An important character of the RCs/LCs is that they are not set in tradition as the clan especially with the executive powers they have which give them political powers therefore an element of radicalism. They are also less driven by precedent unlike the statutory courts. Consequently they are therefore able to respond more readily to influences from the society they are located in especially the State and the changing attitudes of the community, and to new economic and social conditions in adjudicating cases (Weis Bentzon et al:1998:56). In that respect they can be useful instruments of legal

innovation. In the long term the RC/LC is a forum that can be the most effective in regulating the day to day life of the populace and in encouraging their active participation. The research has revealed that the RC/LC courts deal with the bulk of cases in the rural areas and are also involved in dispute settlement in the urban areas. It is therefore necessary to look into ways in which the law courts can work more closely with RCs/LCs for the effective implementation of rules at grassroots. Law courts could be encouraged to use the RCs more, in the implementation of their decisions instead of seeing them as in competition with their authority. It has also been suggested by some members of the legal profession that where possible, there could be a lawyer sitting in a purely advisory capacity, with an Executive Committee during their local council court proceedings. There are few lawyers in the country especially in the rural areas so there are difficulties with this suggestion. It would be more feasible in the urban areas. Currently the Uganda Law Society and the Women Lawyers Association carry out legal aid on voluntary basis. This could be included in their programmes. These associations are also involved in paralegal training. This needs to be on going especially with RC/LC courts. Training the RCs/LCs will also mean training the clan since clan elders in the rural areas generally make up some of the composition of RCs/LCs. An important factor would be in continuing to encourage more women to be members of RCs/LCs, something which the current government of President Museveni is aware of and has taken legislative measures to fulfill. This is discussed further on.

Although the research does not dwell on the impact of HIV/AIDs on property arrangements before death, there is no doubt that this is an area for urgent research. In line with the focus of the thesis, an important area for investigation would be the role of RCs/LCs. A surviving

widow who may be infected and is ill is often in a very vulnerable position. Reports in newspapers have revealed that in some instances, relatives of a deceased husband sometimes throw out a widow who is ill, from the matrimonial home, because she "will soon die anyway." RCs/LCs are given powers in settling disputes of various customary nature. It would guarantee the protection of those who are vulnerable, from the onset, if the RCs/LCs were invited as observers during the ceremony of the distribution of the deceased's estate rather than stepping in when there is a dispute. Special steps will need to be taken to ensure that observers are not interested parties. In the rural areas specially where relatives of a deceased are known to intermeddle with the deceased's property, the RCs/LCs should be given special powers to step in, immediately there is death, to protect the property, until such time as the clan is ready to share the property or the Letters of administration or grant of probate authorised. In any case they already have powers to maintain law and order.

There is also generally the problem of protection of children, especially minor children and their properties, from unscrupulous relatives especially where both parents have died. Orphans have become a crises for the extended family who generally take them in as part of the natural social organisation of society. Orphanages are rare although the number of orphans are high in the country especially because of civil war and in recent years HIV/AIDS (see Appendix 10). The State sees the solution as the responsibility of their communities with the RCs Executive committees given special responsibility for the welfare of children. The State needs to strengthen the role of the RCs and Probation Officers and those responsible for community services. Often limited resources for community services make the task difficult. There should be sufficient budgetary allocations for these social services.

Much of what has emerged in the study has revealed that some current policies of the present Government such as the use of traditional methods of dispute settlement through RCs/LCs are encouraging women to assert themselves and the participation of the local populace in decision making. The State has continued to build on these developments. The 1997 Local Government Act, although implemented after the conclusion of this research is discussed briefly with the relevant sections of the 1995 Constitution. They reveal the current policies of the State in building on the RC/LCs as one of the main ways of enhancing the status of women especially in decision making and, in the wider context, as a system for carrying forward the ideology of popular justice and democracy.

The 1995 Constitution lays down quite clearly the direction in which the Ugandan society is moving and the goals it is seeking to attain. As already discussed, it is a Constitution which was enacted after a country wide consultation with all sectors of society including those at grassroots. Some of the provisions directly touch on the issues covered in the thesis and are discussed below to see the current and future directions for action.

The thesis has revealed that the law is keen not to deprive any person of the benefit of their custom provided it is not repugnant nor contrary to natural justice. The current thinking of the population is to continue to uphold this although more clarity is added.

Article 37 of the Constitution provides that ;

"Every person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others."

The Constitution recognises that there are persons who have been marginalised as a result of some of the practices enumerated above and sets direction for positive action. Article 32(1) provides ;

"Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them."

And with specific reference to women Article 33(5) provides ;

"Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom."

Article 33(6) provides ;

"Laws, cultures, customs or traditions which are against the dignity, welfare or interests of women or which undermine their status, are prohibited by this Constitution."

These are some of the provisions that clearly reveal that women are recognised as having been marginalised and that it requires affirmative action by the State to spearhead redressing the imbalance. Consequently Article 33(2) states that;

"The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement."

Experience shows that the State sees the creation of the RC/LC system as one of the main avenues through which the State can provide some measures to enhance the status of women. The thesis has revealed some of the obstacles that are faced in using the RCs/LCs as a means for conflict resolution though it remains very popular. Having in place laws that seek to redress injustices is not sufficient if the means to do so are not available or if where provided are rejected by the community whose needs it is meant to address. Also a very strong factor is the attitudes or perceptions of the persons who have been marginalised which motives them to assert themselves through the use of the structures created for the purpose. The RCs/LCs have generally been accepted and are being used.

The 1995 Constitution also provides for the setting up of new structures of Local Government and the main principle behind it is stated thus;

"decentralisation shall be a principle applying to all levels of local government and in particular, from higher to lower local government units to ensure people's participation and democratic control in decision making; (Article 176(2)(b)).

In 1997 the State took measures to put these structures in place. Consequently 'The Local Government Act, No 1 of 1997 was enacted. It repealed the 1993 Local Council Statute which had previously repealed the 1987 RC Statute, and is the current law in force. The purpose of the 1997 Act is spelt out as follows;

" An Act to amend, consolidate and streamline the existing law on Local Governments in line with the Constitution to give effect to the decentralisation and devolution of functions, powers and services; and to provide for decentralisation at all levels of Local Governments to ensure good governance and democratic participation in, and control of decision making by the people; and to provide for election of Local Councils and any other matters connected to the above."

One of the striking features of the Act is its emphasis on establishing 'a democratic, political and *gender sensitive* administrative set-up in Local Governments (Section 2(b)). Thus it develops further the thinking of the State on providing opportunities especially for women in decision making.

The statute provides that the Local Government shall be based on the District as a unit under which there are established lower Local Governments and Administrative Units known as councils. In principle it is a development and an expansion on the RC system. Thus, as in the 1987 RC Statute and the 1993 Act, the new councils are in a similar ascending order beginning with Village then Parish, County, Sub-county and District at the highest level (see Figure 10.1) The 1997 councils however have greater powers than the previous Resistance Councils. Section 10 (1) provides that;

"A Council shall be the highest political authority within the area of jurisdiction of a Local Government and shall have legislative and executive powers to be exercised in accordance with the Constitution and this Act".

In the ten years since its first creation, the State has found it necessary to increase the legislative and executive powers of the councils to fulfill its goal of decentralisation and democratic participation in, and control of decision making by the people. The whole Spirit of the Constitution, beginning with the care the State took to consult the ordinary person on what to include, and in encouraging local participation in the debates on Articles of the constitution before its enactment, reflects the current thinking that power belongs to the people and that they will safeguard what they have asked for and indeed they are the guardians of the Constitution. The powers given to the councils in the Local Government Act develops this thinking further. The Chairperson of a Council at Village to District level and of each Executive Committee at all levels is established as the political head of his area of administration. Under the statutes of 1988 and 1993 they were generally administrative heads. Through this the State is giving clear recognition of political power at grass roots and in strengthening it as a tool for democracy. Section 31(1) of the 1997 provides that subject to the Constitution, a Local council shall, among other things, exercise within its area of jurisdiction ;

"all political and executive powers and functions, protect the Constitution and other laws of Uganda and promote democratic governance and ensure the implementation and compliance with Government policy."

Members in the lower Councils in rural areas generally have low literacy and it would appear that what they are being asked to do is above them. However one of the main emphasis of the State since it took power in 1986 has been political education at all levels, including at grassroots in the rural areas. Again the RC/LC has been found to be an effective tool for mobilisation of the masses and dissemination of information. Governments policy is clearly geared to strengthening it. Critics of the system see this as a

continuation of political indoctrination by the State. This also appears to add credence to Santos (1992) arguments that state-sponsored back-to-the community policies is actually the State reproducing itself. However the diversities in ethnic tribes and cultural practices which permeate the interpretation of government policies would make this a very watered down version of the State. Be that as it may, the greater majority of the population have embraced the system as evidenced in their more active involvement in this system than in previous political regimes.

A major set back in the 1987 Statute which was remedied in the 1993 statute was remuneration for members of Councils. In the rural areas especially, parties seeking to settle a dispute found that sometimes they were asked to finance the proceedings which sometimes meant abandonment of cases, or delays. The 1997 statute strengthens the remuneration package and the State has taken upon itself to ensure that this continues. Article 176(2) (d) provides that "there shall be established for each local government unit a sound financial base with reliable sources of revenue."

The above provision is intended to ensure that there are financial resources for the provision of social services and implementation of Government programs at local level. It means finding ways of generating funds at local government unit level, rather than relying on the Central Government. Avenues for efficient disbursement of funds for the services provided to the local population will need to be well planned. This is especially crucial for RCs especially RC1 which are numerous, and often deep in rural areas and tend to deal with most cases as courts of first instance. Efficient disbursement of funds to them may prove difficult.

An important development in the Local councils has been emphasis on ensuring that women make up at least 1/3 of the members of a Council. For example, Councils at District and Sub-county level should have at least 1/3 of their seats for women. In the rural areas, Village and Parish Executive Councils should reserve at least 1/3 of their seats for women. Women are also encouraged to set up 'Women Councils' at Village and Parish levels. The Chairperson of each Women Council in each Village or Parish is expected to sit in her Village or Parish Executive Committee as Secretary for women and the Public Health Co-ordinator. This is in line with the State's efforts at affirmative action to enhance the status of women as provided in the 1995 Constitution. It is the Executive Committee that has judicial powers and sits as a judicial body. It is thus the intention of the State that the presence of a larger group of women in the Committees and Councils will encourage and ensure better justice for women at all levels. The State has also set itself the task of protecting *"women and their rights, taking into account their unique status and natural maternal functions in society(Article33(1))."* The identity of a woman as 'wife/mother/widow' continues to carry great weight with the State and legislators and it is a 'ticket' she can use to assert her rights in family relations. It is for this reason that there is a Public Health Co-ordinator at grass roots. While some critics may see this as emphasising the reproductive function of a woman, in the current history of the country where 89% of the population live in rural areas, and the family seen as the strength of the Community, women who are child bearers and food providers in the community should be protected. There are women who are Chairpersons of Executive Committees and Councils thus the giving of political power to chairpersons would give women who are successfully elected, the political power over their administrative areas including at grassroots in the

rural areas where male dominance is more pronounced. This, plus the special protection accorded them would strengthen their position. In the final analysis, although the State may provide the facilities and opportunities it is up to the women to take advantage of these opportunities through a concerted effort that breaks down barriers of class, religion, ethnic origin and status.

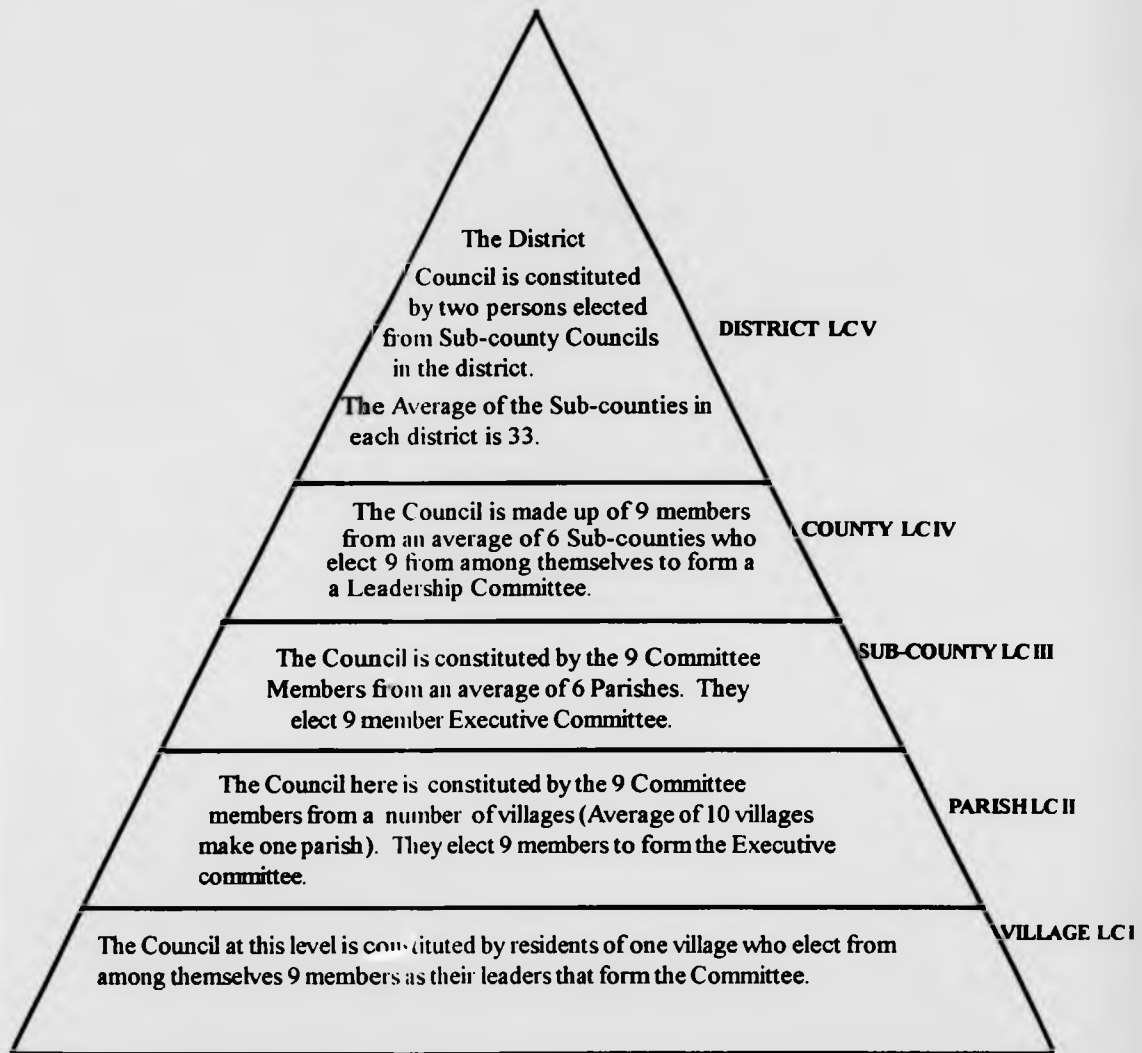
The RCs which began as mainly administrative structures with judicial powers are now being developed by the State to structures with effective legislative and executive powers and the right to exercise political power. The RCs have generally felt that their powers were limited and they were constrained in their exercise of it. The present developments give them greater powers and freedom. However, in the exercise of their judicial functions the State is still reluctant to increase their powers. Whereas they are free to make any bye-laws that are not inconsistent with the Constitution and any law enacted by Parliament, they cannot make any laws relating to the establishment or administration of courts or to the exercise of judicial powers. In a State where there are now countless Executive Committees with judicial powers, an increase in their powers may lead to abuse of the power. The State also wants to strengthen the independence of the Judiciary.

The complexity of the power relationship of the RC with the clan structures especially the demarcation of their powers is made clearer by the political powers given the RCs. Where the Head of a clan in a rural area is elected RC Chairman he will be required to exercise political power according to State policy. Current state policies except for certain customs and cultural practices are outside the ability of customs to respond to, in customary ways. The positive side of having members of the clan in RCs in these situations is that they will be enjoined to act according to current policies and this can water down their deep rooted

cultural ideology which the State is seeking to do gradually. The research reveals that people do want a change from rigid cultural practices because there are changes taking place in their lives and their environment. There is therefore support for change with the RC located favorably at grassroots and with a favorable ideology.

Efforts to bring about change in the situation of women have often sought to give women the solutions without consideration of their historical experience and the realities of their specific cultural context. Not much emphasis is given in discovering what they want and what they have already done or are doing about their situation. This approach denies a woman her history, the expression of her value, her need and her role in decision making, in areas that affect her as an individual. It denies her the expression of her self and therefore leaves her 'covered.' A recognition of women as 'knowers' by society, backed by State action which encourages them into decision making and provides opportunities and protection for them, while at the same time dealing with the ills in society that subordinates them, can give women the ability to assert themselves and so dispel the image of 'the passive victim'.

HIERACHY OF LOCAL COUNCILS (LCs)



Note: LC means Local Council and Local Committee. There is a Committee and a Council at each level. All the 39 districts are organised under this structure.

(UGANDA GOVERNMENT)

FIGURE : 10.1

Information on children (1991 Census)

District	Total Population	Children		Orphans	
		No.	%	No.	%
Mpigi	913,867	269,869	29.5	90,193	33.4
Mukono	824,604	237,817	28.8	68,740	28.9
Rakai	383,604	228,451	59.6	58,339	25.5
Kalangala	16,371	7,341	48.8	1,792	24.4
Soroti	430,390	236,268	54.9	56,143	23.8
Kumi	236,694	128,108	54.1	29,365	22.9
Moyo	175,645	102,809	58.5	23,052	22.4
Gulu	338,427	190,895	56.4	40,480	21.4
Luwero	449,691	264,522	58.8	54,952	20.8
Masaka	838,736	506,447	60.4	102,542	20.2
Kitgum	357,184	205,340	57.5	40,935	19.9
Kiboga	141,607	82,510	58.3	15,410	18.7
Moroto	174,417	100,813	57.8	18,488	18.3
Kampala	774,241	411,493	53.1	72,239	17.6
Kotido	196,000	116,767	59.6	20,057	17.2
Rukungiri	390,780	238,243	61.0	38,373	16.1
Mubende	500,976	296,036	59.1	46,664	15.8
Mbarara	930,772	544,732	58.5	85,592	15.7
Lira	500,965	484,657	56.8	44,613	15.7
Kabarole	746,800	448,517	60.1	67,911	15.1
Arua	637,941	366,824	57.5	52,286	14.3
Masindi	260,790	148,472	56.9	20,663	13.9
Nebbi	316,866	182,895	57.7	25,445	13.9
Bundihugyo	116,566	66,923	57.4	9,308	13.9
Bushenyi	736,361	448,482	60.9	57,803	12.9
Kabale	417,218	253,220	60.7	32,895	12.9
Hoima	197,851	115,758	58.5	14,611	12.6
Tororo	555,574	312,332	56.2	38,970	12.5
Apac	454,504	263,190	57.9	32,413	12.3
Kibale	220,261	134,383	61.0	16,336	12.2
Jinja	289,476	163,733	56.6	19,187	11.7
Iganga	945,783	544,712	57.6	60,179	11.0
Kisoro	186,681	116,367	62.3	12,714	10.9
Fallisa	357,656	200,888	65.2	121,575	10.7
Kamuli	485,214	275,276	56.7	28,048	10.2
Kasese	343,601	210,911	61.4	20,846	9.9
Miraic	710,890	398,576	56.1	39,240	9.8
Kapchorwa	116,702	68,965	59.1	6,683	9.7
Total	16,671,712	9,173,542	55.0	1,485,142	16.2

SOURCE: POPULATION CENSUS

APPENDIX 10

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Several texts were widely consulted and became the starting point of the research and analysis. As the thesis progressed and tightened, some of these texts which were cited in the thesis at its commencement were weeded out. However, they have greatly influenced my thought processes. Consequently, the bibliography also acknowledges text which are now not included in this thesis but which are relevant.

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